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IN THE OFFICE OF THE CLERK
Supreme Court of the United States
OCTOBER TERM, 1996

JEAN G. MATTERN,

Petitioner,

v.

EASTMAN KODAK COMPANY, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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78 pp

QUESTION PRESENTED

Does section 704(a) of Title VII of the 1964 Civil Rights Act permit an employee to be retaliated against, by or with the knowledge of company supervisors, for filing a charge with EEOC or otherwise opposing unlawful discrimination, so long as the retaliation does not constitute an "ultimate employment decision"?

PARTIES

The petitioner is Jean G. Mattern. The respondents are the Eastman Kodak Company and the Eastman Chemical Company, doing business as the Texas Eastman Company.

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No. 97-

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner Jean G. Mattern respectfully prays that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered on January 16, 1997.

OPINIONS BELOW

The opinion of the Fifth Circuit, which is reported at 104 F.3d 702 (5th Cir. 1997), is set out at pp. 1a-40a of the Appendix hereto. The decision of the court of appeals denying rehearing and rehearing en banc, which is not reported, is set out at p. 40a-41a of the Appendix. The September 14, 1995, opinion of the district court denying respondents' motion for judgment as a matter of law, which is not reported, is set out at pp. 42a-45a of the Appendix.

JURISDICTION

The decision of the Fifth Circuit was entered on January 16, 1997. A timely petition for rehearing was denied on April 22, 1997. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254.

STATUTE INVOLVED

Section 704(a) of Title VII of the 1964 Civil Rights Act, 42 U.S.C. §2000e-3(a), provides in pertinent part that it shall be unlawful "for an employer to discriminate against any of his employees . . . because he has opposed any practice made unlawful by this title, or because he has made a charge . . . under this title."

STATEMENT OF THE CASE

This case has its origins in a particularly noxious pattern of sexual harassment. From October 1989 until July 1993 petitioner worked as a mechanical apprentice at a large chemical plant operated by respondent in Harrison County, Texas. During the latter part of this period, petitioner was repeatedly assaulted by two senior company mechanics, Johnny Godwin and George Roberts. On numerous occasions, these men grabbed petitioner's breasts and buttocks, touched her in other sexual ways, referred to her as "my bitch", and attempted to engage her in discussions of her sexual practices. Godwin regularly forcibly held petitioner over his lap and "spanked" her. This conduct at times occurred in the office or in plain view of petitioner's supervisor. The harassment was so severe that petitioner ultimately required medical treatment.

Petitioner eventually sought the assistance of counsel, brought the abuse to the attention of company officials, and filed a Title VII charge with the EEOC. On March 11, 1993, high ranking company officials asked Godwin to take early retirement, to which he agreed. No action was taken, however, against Roberts or any of the other accused

harassers brought to respondent's attention. Petitioner's complaint, and the ensuing removal of Godwin, triggered a campaign of harassment against petitioner herself. As respondent's counsel explained below, the removal of Godwin caused "its employees . . . disappointment and anger that a coworker ha[d] been removed."[1] That harassment soon drove petitioner herself from the plant. She resigned on July 19, 1993, four months after her complaint had cost Godwin his own job.

The retaliation that followed petitioner's complaint occurred largely at the hands of company supervisors. Petitioner's most senior supervisor openly announced that he was going to "fire" petitioner. (App. 26a). The senior supervisor responsible for apprentice progression put petitioner on "final warning" of discharge.(App. 7a, 24a). Petitioner's job performance and mechanical skills, which previously had been satisfactory, were now rated poorly by the same supervisors who had earlier praised her work. (App. 7a, 25a). These negative ratings caused petitioner to miss a pay increase. (App. 7a, 24a). As part of her job testing, after her complaint was filed, petitioner was required to realign a pump that had been deliberately placed on a wooden pallet, rather than a solid base, to make the test impossible to perform. (App. 7a).

Further, petitioner was required to climb scaffolding in a fire protection suit so large as to make the ascent dangerous. (App. 6a, 24a). On the same day that respondent's managers forced Godwin to retire, petitioner was home ill. Respondent sent a senior manager and petitioner's supervisor to petitioner's home to insist that she return with them to the Eastman medical department for evaluation. This action was admitted to be "highly unusual, if not unprecedented." (App. 6a, 24a). On March 29, 1993, when petitioner went to Eastman's Human Resources

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[1]Brief for Appellant, No. 95-40836 (5th Cir.), p. 20.

Department to complain about the retaliation, she was reprimanded by her managers for being outside her work area (App. 6a, 24a).

Petitioner was also harassed by her fellow workers following her charge of harassment, in part because Eastman had returned petitioner to the very work environment she had complained about and to working with the very men, other than Godwin, she had accused of harassment. A pump which she had repaired was deliberately sabotaged. (App. 25a). Several workers commented to petitioner that "accidents happen" (App. 26a). Petitioner's locker was broken into and several of her tools stolen, rendering it difficult for petitioner to perform her job. (App. 6a). Petitioner repeatedly complained about this harassment to company officials. A written complaint was also made to respondent by petitioner's attorney. Her physician was so alarmed that he too called Eastman management. (App. 26a). Petitioner and her physician testified that company officials responded that there was nothing they could or would do about the harassment.[2]

Petitioner ultimately filed suit under Title VII of the 1964 Civil Rights Act, as amended, in the United States District Court for the Eastern District of Texas. Her complaint alleged two distinct causes of action: sexual harassment and retaliation. A jury concluded that petitioner had indeed been subject to sexual harassment, but denied recovery because it concluded that company officials had taken prompt remedial action against Godwin. (App. 2a). The jury found that petitioner had not been constructively discharged. The jury found that respondent had retaliated against petitioner for having complained about the sexual harassment, and awarded $50,000 in compensatory damages. In separate orders, the trial court awarded petitioner, as the prevailing party, attorneys' fees and expenses.

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[2]Record, VII p. 112; IX pp. 122-24, 269-70.

On appeal, respondent did not argue that the damage award was excessive. Rather, respondent contended, and the Fifth Circuit held, that the retaliatory acts complained of simply were not unlawful, even if they were taken—as the jury had found—to punish petitioner for having complained about the proven sexual harassment. The Court of Appeals panel ruled that an employer could retaliate against a worker for complaining about or filing charges of unlawful discrimination, so long as the form of retaliation did not involve an "ultimate employment decision". Judge Dennis dissented from the panel decision, insisting that the Fifth Circuit's "ultimate employment decision" doctrine was "contrary to the clear statutory language, the Supreme Court decisions, and all prior jurisprudence." (App. 39a).

Petitioner filed a timely petition for rehearing and suggestion for rehearing en banc. On February 18, 1997, while that petition for rehearing was pending, this Court decided *Robinson v. Shell Oil Company*, 117 S.Ct. 843 (1997). That same day counsel for petitioner brought *Robinson* to the attention of the Fifth Circuit by letter, as contemplated by Fifth Circuit Rule 28.4.[3] On April 22, 1997, the Fifth Circuit nonetheless denied the petition for rehearing and declined to set the case for reconsideration en banc.

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[3]Letter of Margaret A. Harris to Ms. Mary Francis Noveh, Clerk, United States Court of Appeals for the Fifth Circuit, February 18, 1997.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION BELOW IS IN CONFLICT WITH THE DECISIONS OF SEVEN OTHER CIRCUITS

This case concerns a peculiar Fifth Circuit doctrine that expressly permits employers to retaliate against employees who file charges with EEOC, or who otherwise oppose discrimination, so long as the employers utilize certain approved methods of retaliation. In the instant case a jury found that petitioner had been subject to a long series of retaliatory acts by or known to respondent's supervisors, and concluded that that retaliation had caused petitioner $50,000 in damages. The Fifth Circuit did not question the jury's findings that the actions had occurred and that respondent intended to retaliate against petitioner; nor did the court of appeals dispute the jury's finding that those retaliatory acts had injured petitioner in the amount awarded. The court of appeals nonetheless overturned the jury verdict, reasoning that the retaliatory methods utilized by respondent were "non-actionable" under Title VII of the 1964 Civil Rights Act. (App. 12a).

The decision below applied the Fifth Circuit's "long-held rule that Title VII's anti-retaliation provision refers to ultimate employment decisions, and not to an 'interlocutory or mediate' decision which can lead to an ultimate decision." (App. 13a). The only retaliatory methods impermissible to employers in the Fifth Circuit are those involving "ultimate employment decisions", "acts 'such as hiring, granting leave, discharging, promoting, and compensating.'" (App.10a). All other retaliatory methods are permitted in the Fifth Circuit, even though they "*might* jeopardize employment in the future" (App. 12a)(emphasis in original), "increas[e] the chance that [a complainant] would eventually suffer" an adverse "ultimate employment decision" (App. 12a)(emphasis omitted), or "'would tend' to affect the employee." (App.

14a). As the EEOC noted below in its brief urging rehearing, "The majority held in this case . . . that Title VII permits an employer to harass and reprimand an employee for filing a Title VII charge, to unfairly evaluate her work and threaten to discharge her, as long as the employer stops short of firing or demoting the employee."[4] The rule that such forms of retaliation are lawful under Title VII, the court below held, is a "binding precedent". (App. 11a).

In explaining its holding that Title VII forbids only those retaliatory actions involving "ultimate employment decisions," the Fifth Circuit specifically listed a wide range of retaliatory acts that, in its view, are permitted by Title VII:

> (1) "the verbal threat of being fired" (App. 11a), and being placed "on 'final warning' of discharge" (App. 7a, 10a);
>
> (2) "disciplinary filings" (App. 12a), "supervisor's reprimands" (App. 12a), and reviewing petitioner's work "more negatively after she . . . EEOC charge" (App.6a, 7a, 11a);
>
> (3) being "required to climb scaffolding in a fire protection suit that . . . was unsafe" (App. 6a);
>
> (4) when petitioner was out sick, sending "two . . . supervisors to [her] house to instruct her to return to Eastman" an action which was "highly unusual, if not unprecedented" (App. 6a, 11a);

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[4]Brief of the Equal Employment Opportunity Commission as Amicus Curiae in Support of Petitions for Rehearing and Suggestion of Rehearing En Banc, No. 95-40836 (5th Cir.), pp. 10-11; *see id.* at 5. ("According to the majority, § 704 does not prohibit an employer from subjecting an employee to a campaign of harassment and intimidation because she filed a charge, even where, as here, the harassment causes the employee physical harm.")

(5) failing to protect petitioner when she complained to Kodak that hostile fellow workers "would mutter 'accidents happen'" and had broken into petitioner's locker and stolen some of her tools (App. 6a, 11a);

(6) "causing [petitioner] to miss a pay increase" (App. 7a, 15a) or "prolonging the time [complainant] had to wait for disbursement checks" (App. 12a);

(7) requiring petitioner to work on machinery "deliberately placed" in such a manner as to "scuttle her efforts" to repair it (App. 7a-8a);

(8) being "refused consideration for promotion" (App. 11a);

(9) being "refused attendance at a training conference" (App. 11a);

(10) giving a complainant "false information regarding aspects of [the complainant's] employment, including access to travel funds and methods of filing EEO complaints" (App. 12a);

(11) "deleting experience data from a reference form" (App. 13a);

(12) distributing an "office newsletter . . . routinely ridiculing the [complainant] based on her . . . having filed EEOC complaint" (App. 13a).

Such retaliatory acts, the Fifth Circuit held, are simply "non-actionable" (App. 12a) because they "do not constitute ultimate employment decisions" (App. 11a).

The dissenting member of the Fifth Circuit panel below correctly observed that the majority opinion conflicts with decisions in numerous other lower courts (App. 12a). In fact seven other circuits have ruled that the anti-retaliation provisions of federal anti-discrimination laws are not limited to "ultimate employment actions" such as hiring, firing, and promotions.

The District of Columbia Circuit holds that the ADEA, like Title VII,

> proscribes "discrimination" against those who invoke the Act's protections; the statute does not limit its reach only to acts of retaliation that take the form of cognizable employment actions such as discharge, transfer or demotion. . . . Nor could a more restrictive reading of ADEA's anti-retaliation provision be squared with other cases that have found illegal retaliation in employer conduct that could not be described strictly as an "employment action."

Passer v. American Chemical Soc., 935 F.2d 322, 331 (D.C. Cir. 1991) (citing cases in the District of Columbia, Tenth and Eleventh Circuits). In *Passer*, the District of Columbia Circuit upheld the legal sufficiency of a claim that an employer had retaliated against Dr. Passer by cancelling a symposium in his honor. 935 F.2d at 330. In *Smith v. Secretary of the Navy*, 659 F.2d 1113 (D.C. Cir. 1981), the Court of Appeals awarded injunctive relief to a plaintiff where an "unfavorable supervisory evaluation" had been placed in his file in retaliation for his EEO activities, 659 F.2d at 1121. The court continued:

> [T]he findings of the District Court establish that appellant has so far suffered no financial loss as a result of the improper evaluation given by his supervisor. Maintenance of the prohibited assessment in Smith's personnel file would damage him by threatening his prospects for future promotions or merit awards.

659 F.2d at 1122. The claim on which Smith prevailed in the District of Columbia Circuit would be dismissed as legally insufficient in the Fifth Circuit.

In *Welsh v. Derwinski*, 14 F.3d 85 (1st Cir. 1994), the First Circuit expressly refused to read into the anti-

retaliation provision of the ADEA the narrow limitations adopted by the Fifth Circuit.

> Defendant . . . argues that a reduction in duties could not be an "adverse employment action" . . . [and] that only discharge, demotion, or failure to promote can constitute an adverse employment action within the Act. We do not agree. . . . [M]any things, such as constant rudeness, conspicuous discriminatory acts, etc., could have an adverse effect upon employment.

14 F.3d at 86.

Similarly, the Seventh Circuit has expressly rejected arguments that section 704(a) applies only to acts of retaliation that necessarily cause an immediate loss of income.

> [C]ontrary to defendants' assertion, several courts have found an adverse job action, for purposes of . . . retaliation, in a lateral transfer even where the transfer did not result in a reduction of pay or benefits. Title VII does not limit adverse job action to strictly monetary considerations. One does not have to be an employment expert to know that an employer can make an employee's job undesirable or even unbearable without money or benefits ever entering the picture. . . . We believe adverse job action is not limited to loss or reduction of pay or solely monetary benefits. It can encompass other forms of adversity as well. For example, other courts have found adverse job impact, where there was no reduction in salary or benefits, in an employer's moving an employee's office to an undesirable location, transferring an employee to an isolated corner of the workplace, and requiring an employee to relocate her personal files while forbidding her to use the firm's stationary and support services.

Collins v. State of Illinois, 830 F.2d 692, 702-703 (7th Cir. 1987). The Seventh Circuit has recognized a cause of action for a variety of retaliatory acts that would be legal in the Fifth Circuit. *Collins v. State of Illinois* (retaliatory transfer without loss of pay); *McKenzie v. Illinois Department of Transp.*, 92 F.3d 473, 484 (7th Cir. 1996) (retaliatory refusal to deliver certain forms to plaintiff, which "made her job more difficult"); *EEOC v. Board of Governors of State Colleges*, 957 F.2d 424 (7th Cir. 1992) (retaliatory refusal to process discrimination grievance); *Reeder-Baker v. Lincoln Nat'l. Corp.*, 834 F.2d 1373, 1375 (7th Cir. 1987) (retaliatory acts included lower performance evaluation and placing complainant on probation). The Seventh Circuit has correctly observed that threats of punitive action short of dismissal can often deter employees from speaking out.[5]

The Ninth Circuit has repeatedly recognized a cause of action for types of retaliation that fall short of the Fifth Circuit standard of "ultimate employment decision." *Steiner v. Showboat Operating Co.*, 25 F.3d 1459, 1462-66 (9th Cir. 1994) (lower evaluation, ridicule by supervisor, being put in

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[5]*McGill v. Board of Educ. of Pekin Elementary School*, 602 F.2d 774, 780 (7th Cir. 1979) ("the threat of transfer—whether it be to a school with a less desirable reputation or one perceived as dangerous or one that is difficult to get to—could be an effective means of chilling . . . speech"); *see also Wallace v. Benware*, 67 F.3d 655, 662 (7th Cir. 1995) (refusal to provide materials and equipment needed to perform the job; refusal of supervisor to speak with employee); *Dahm v. Flynn*, 60 F.3d 253, 257 (7th Cir. 1994) ("a dramatic downward shift in skill level required to perform job responsibilities can rise to the level of an adverse employment action"); *Pieczynski v. Duffy*, 875 F.2d 1331, 1335-6 (7th Cir. 1989) (retaliatory acts included baseless charges of misconduct, eliminating supervisory powers, verbal abuse, denial of requests for different lunch hour; damage award of $95,000 upheld despite the fact that complainant had "retained her job, salary, benefits, etc. in the face of the alleged campaign of harassment"); *Bart v. Telford*, 677 F.2d 622, 625 (7th Cir. 1982) (deterrence by "harassment and ridicule").

a worse job or given additional duties); *Yartzoff v. Thomas*, 809 F.2d 1371, 1376 (9th Cir. 1987) ("[t]ransfers of job duties and undeserved [unfavorable] performance ratings . . . would constitute 'adverse employment decisions' cognizable under . . . section [704(a)]"); *Cohen v. Fred Meyer, Inc.*, 686 F.2d 793, 795 (9th Cir. 1982) (requiring complainant to work night and weekend shifts); *St. John v. Employment Development Dept.*, 642 F.2d 273 (9th Cir. 1981) (affirming finding of violation for retaliatory transfer).

The Eighth Circuit has found a violation of section 704(a) and ordered injunctive relief where a supervisor had conducted an "intensive interrogation of [a charging party] as to why he filed a charge of discrimination with EEOC." *Paxton v. Union Nat'l. Bank*, 688 F.2d 552, 572 (8th Cir. 1982); *see also Smith v. St. Louis University*, 109 F.3d 1261, 1266 (8th Cir. 1997) ("actions short of termination may constitute adverse actions within the meaning of the statute"). The Tenth Circuit recognizes a cause of action under section 704(a) for such retaliatory acts as initiating a retaliatory criminal prosecution, *Berry v. Stevinson Chevrolet*, 74 F.3d 980, 986 (10th Cir. 1996), or reassigning a complainant against her wishes to another job. *Sauers v. Salt Lake County*, 1 F.3d 1122 (10th Cir. 1993). The Second Circuit has recognized a retaliation claim where an employer, allegedly for retaliatory reasons, had failed to ask a complainant if she wanted to work on a particular overtime assignment. *Aldrich v. Randolph Cent. School Dist.*, 963 F.2d 520, 529 (2d Cir. 1992); *see Aebisher v. Ryan*, 622 F.2d 651, 655 (2d Cir. 1980) (employee speech "may be deterred almost as potently by the threat of sanctions as by their actual application.")

On the other hand, the Fourth Circuit applies a version of the "ultimate employment decision" doctrine evidently more sweeping than the Fifth Circuit doctrine applied in this case. The Fifth Circuit rule set out in the decision below is expressly limited to retaliation claims; the

court below held that at least some adverse employment actions short of ultimate employment decisions, and thus on its view permissible as methods of retaliation, would be unlawful under section 703(a)(2) if taken against an employee because of his or her race, national origin, religion or gender. (App. 13a-14a.)[6] In the Fourth Circuit, however, discrimination other than in ultimate employment decisions is lawful, not only as methods of retaliation under section 704(a), but also as methods of discrimination under sections 703(a) and 717. *Page v. Bolger*, 645 F.2d 227 (4th Cir. 1981). The application of Title VII's prohibition against intentional discrimination, *Page* held

> has consistently focused on . . . discrimination in what could be characterized as ultimate employment decisions such as hiring, granting leave, discharging, promoting, and compensating. . . . . "[U]ltimate employment decisions" . . . alone should be held directly covered by §717 and comparable antidiscrimination provisions of Title VII.

645 F.2d at 233. The Fourth Circuit has repeatedly applied *Page v. Bolger* to dismiss non-retaliation claims.[7] The

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[6]The Fifth Circuit had earlier applied the ultimate employment decision doctrine to a non-retaliation claim. *Dollis v. Rubin*, 77 F.3d 777, 782 (5th Cir. 1995).

[7]*Bodkin v. West*, 91 F.3d 129 (Table), 1996 WL 406249 (4th Cir. 1996) (Title VII does not forbid discriminatory processing on the basis of race of information related to plaintiff's request for security clearance); *Hooper v. State of Maryland*, 45 F.3d 426 (Table), 1995 WL 8043, *4 (4th Cir. 1995) (discrimination in assignment lawful); *Smith v. American National Red Cross*, 1992 WL 357850 *4 (4th Cir. 1992) (lawful to discriminate in filling out interview reports); *Young v. Lehman*, 748 F.2d 194, 198 (4th Cir. 1984) (Title VII not violated by race-based decision to disband promotion panel which had recommended promotion of black plaintiff and creation of a second panel to redecide the issue).

Fourth Circuit's definition of an "ultimate employment decision" evidently differs to some degree from the Fifth Circuit's definition. *Compare Page*, 645 F.2d at 233 (denial of training is an ultimate employment decision) *with* App. 11a (*contra*). In one case the Sixth Circuit has applied the equivalent of an ultimate employment decision rule in a non-retaliation case. *Cesaro v. Lakeville Community School Dist.*, 953 F.2d 252, 254-55 (6th Cir. 1992) (decision to open position to outside applicants not actionable under Title VII even if motivated by a desire to discriminate against female internal applicant). Other lower court decisions have expressly "disagreed with *Page*" (App. 34a n.1).

Finally, the Eleventh Circuit has expressly declined to decide whether an employer could lawfully retaliate against an employee by means of the sort of harassment which would unquestionably be illegal if motivated by an employee's race or gender.

> [W]e cannot find any [Eleventh Circuit] case that clearly established that retaliatory harassment—as opposed to sexual or racial harassment—could violate Title VII where the employer caused the employee no tangible harm, such as loss of salary, benefits, or position. The statute itself says that an employer cannot "discriminate" against a protected employee. That all hostile acts are wrongful is not plain from this language. Although we have interpreted Title VII to mean that an employer cannot retaliate by taking an "adverse employment action" against an employee . . . , we have never defined what this general phrase means. . . . [W]e do not reach this . . . issue.

Wu v. Thomas, 996 F.2d 271, 273-74 (11th Cir. 1993) (footnote omitted). The Eleventh Circuit recognized that the Seventh Circuit had held such retaliation unlawful. 996 F.2d at 274 n.4 (*citing Collins v. Illinois*). But, reasoning that the absence of a prior Eleventh Circuit decision on this issue

meant that supervisors enjoyed qualified immunity, the court in *Wu v. Thomas* overturned a substantial damage award based on jury findings of an extensive campaign of harassment of the plaintiff.[8]

It is noteworthy that the EEOC has long maintained, as it argued below, that section 704(a) protects employees and former employees from *any* form of adverse action.

> Harassing or intimidating an individual because that individual has opposed employment discrimination is a violation of Section 704(a). Harassment or intimidation can take many forms . . . [r]etaliatory reprimands . . . [c]oercive questioning . . . [r]etaliatory surveillance . . . .

EEOC COMPLIANCE MANUAL, Section 614.7 (App. 19a). The EEOC holds that an employer would violate section 704(a) if it knew that coworkers were retaliating against a complainant and failed to take effective measures to end that retaliation. *Id.* at section 614.7(g)2) (App.19a-20a). Under the decision below, however, such knowing inaction could not violate section 704(a), because fellow employees would be incapable of taking the types of retaliatory acts, such as firing the charging party, that the Fifth Circuit regards as an ultimate employment decision.

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[8]The defendant supervisor had, *inter alia*, written "a list of 'bankers[sic] dozen ideas' to discipline Kathleen Wu; . . . called her dishonest with no proof; and damaged her reputation as a teacher and a person." 996 F.2d at 273 n. 1. The jury had awarded $20,000 in compensatory damages. 996 F.2d at 272.

II.

THE DECISION BELOW IS IN CONFLICT WITH THREE DECISIONS OF THIS COURT

The decision below conflicts on several different grounds with this Court's decision in *Robinson v. Shell Oil Co.*, 117 S. Ct. 843 (1997). First, *Robinson* expressly upheld a cause of action under section 704(a) based on a retaliatory job reference; nothing in the opinion indicated that such retaliation would be legal until and unless a second employer actually relied on that adverse reference in refusing to hire the victim. The Fifth Circuit below, however, held that a retaliatory less favorable job reference would be lawful: "deleting experience data from a [job applicant's] reference form . . . did not constitute retaliation . . . . an ultimate employment decision had not occurred" (App. 12a-13a). That holding was compelled by the Fifth Circuit's insistence that Title VII permits retaliatory acts that would only "tend to" result in the denial or loss of a job; a retaliatory adverse job reference does not guarantee an applicant will not be hired, just as the retaliatory adverse performance evaluations in this case did not automatically mean petitioner would be fired.

Second, *Robinson* held that it would be inconsistent with the purpose of section 704(a) to effectively exclude former employees from the protection of the prohibition against retaliation. 117 S. Ct. at 848-49. Under the Fourth Circuit rule overturned in *Robinson*, a former employee was completely outside the protections of section 704(a), except in the rare case in which he or she reapplied for work at his or her former employer. The Fifth Circuit's "ultimate employment decision" rule in the instant case has precisely the same consequence as the Fourth Circuit rule rejected by this Court in *Robinson*, because no retaliatory act that *could* be taken against a former employee, except a refusal to rehire, could constitute such an "ultimate employment decision."

Third, the decision below is manifestly inconsistent with what *Robinson* described as a "primary purpose of antiretaliation provisions: Maintaining unfettered access to statutory remedial mechanisms." 117 S.Ct. at 848. The Fifth Circuit doctrine provides employers with a rich arsenal of retaliatory techniques with which to punish and deter current and former employees who file charges with the EEOC or who otherwise oppose discriminatory practices.

The decision below conflicts as well with *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993) and *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), as Judge Dennis noted in his dissenting opinion below (App. 20a-21a, 38a, 39a). The pivotal rationale of the Fifth Circuit is that the term "discriminate" in section 704(a) should be given the same meaning as the term has in section 703(a)(1). Section 703(a)(1), the court below noted, only declares it unlawful to "fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment." In *both* section 703(a)(1) and section 704(a), the Fifth Circuit insisted, "discrimination" "include[s] only ultimate employment decisions", and not other "vague harms" which "'would tend' to affect the employee" (App. 13a-14a). Systematic harassment, the panel reasoned, simply is not "discrimination" within the meaning of either section, even though it may have "a tangential effect on conditions or employment, . . . [because] in Mattern's case, an ultimate employment decision had not occurred" (App. 13a).

This refusal to treat harassment as "discrimination" under Title VII is flatly inconsistent with *Harris* and *Meritor*. Both decisions hold expressly that the "discrimination" forbidden by section 703(a)(1) in the terms, conditions and privileges of employment:

> is not limited to "economic" or "tangible" discrimination. The phrase "terms, conditions, or privileges of employment" evinces a congressional

> intent "to strike at the entire spectrum of disparate treatment of men and women" in employment.

Harris, 510 U.S. at 21; *Meritor*, 477 U.S. at 64. "A *discriminatorily* abusive work environment, even one that does not seriously affect employees' psychological well-being, can and often will detract from the employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers." *Harris*, 510 U.S. at 22 (emphasis added). *See id.* at 23 (referring to harassment as "discriminatory conduct"), 25 (Scalia, J., concurring) (Title VII violated when "working conditions have been discriminatorily altered" by harassment), 25 (Ginsburg, J., concurring) (referring to harassment as "discriminatory conduct" under section 703(a)(1); *Meritor*, 477 U.S. at 65 (harassment violated right under section 703(a)(1) to "an environment free from discriminatory intimidation, ridicule, and insult"), 66 (Title VII prohibits "a hostile environment based on discriminatory sexual harassment") (emphasis omitted).

The reasoning of the Fifth Circuit opinion conflicts with this Court's decision in *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990). The defendants in *Rutan* had retaliated in a variety of ways against government employees who had failed to support the Republican Party. The Seventh Circuit held that the First Amendment prohibition against such retaliation applied only where the victims were either formally dismissed or were constructively discharged by being subject to abuses so severe "as to be tantamount to outright dismissal." *Rutan v. Republican Party of Illinois*, 868 F.2d 951, 950-52 (7th Cir. 1989). One of the plaintiffs in *Rutan* alleged that he had been denied a desirable transfer in retaliation for failing to support the Republicans. This Court reversed the decision of the Seventh Circuit permitting such forms of retaliation, holding that *any* retaliation—including the denial of a transfer—was within the scope of the First Amendment's protections:

> respondents . . . argue that the employment decisions at issue here do not violate the First Amendment because the decisions . . . do not in any way adversely affect the conditions of employment, and therefore do not chill the exercise of protected belief and association by public employees. This is not credible. . . . Employees denied transfer to workplaces reasonably close to their homes until they join and work for the Republican Party will feel a daily pressure from their long commutes to do so. . . . We therefore determine that . . . transfers . . . based on political affiliation or support are an impermissible infringement on the First Amendment rights of public employees. . . . The Seventh Circuit proposed that only those employment decisions that are the "substantial equivalent of a dismissal" violate a public employee's rights under the First Amendment. . . . We find this test unduly restrictive because it fails to recognize that there are deprivations less harsh than dismissal that nevertheless press state employees and applicants to conform their beliefs and associations to some state-selected orthodoxy.

Rutan, 497 U.S. at 73-75. Obviously the forms of retaliation expressly permitted by the decision below against Title VII charging parties will have precisely the chilling effect of the practices condemned by this Court in *Rutan*.

The decision below is inconsistent as well with *Meritor's* holding regarding when an employer is liable under Title VII for harassment of an employee by coworkers. Under *Meritor* an employer is liable for discriminatory harassment of one worker by fellow employees, *inter alia*, if the employer has knowledge of the harassment and fails to take prompt effective action to end it. 477 U.S. at 71-73. In the instant case petitioner proved that she, her attorney and her physician had all complained about the coworker harassment to company officials, who refused to act. The dissenting judge below noted, and the panel majority did not

deny, that there was ample evidence that those officials had failed to end retaliatory harassment of which they were well aware. (App. 17a, 22a-26a). The Fifth Circuit, however, held that such a demonstration was legally insufficient to turn the harassing employees into "agents" of respondent for purposes of section 704(a). (App. 11a).

III.

THIS CASE PRESENTS ISSUES OF SUBSTANTIAL IMPORTANCE

In its brief in the court below urging rehearing in the instant case, the EEOC accurately described the importance and harmfulness of the decision at issue:

> Unless employees are assured that they will not be subject to any form of backlash from their employers for coming forward with complaints about discrimination, their willingness and ability to seek redress for injuries resulting from discrimination will be chilled. Furthermore, since the Commission relies on complaints from individual employees to uncover and remedy discrimination, its enforcement efforts will be severely hampered by any judge-made limitations on the plain language and coverage of § 704. . . . The harm caused by retaliatory acts does not depend on the particular method of retaliation chosen by the employer. An employer can intimidate employees by conduct that does not constitute an employment action as well as by retaliatory employment decisions . . . . The panel majority's unjustified restriction on the scope of the prohibition on retaliation provided by Congress threatens the effectiveness of § 704, as well as the statute as a whole. . . . If this decision is allowed to stand, employees within the jurisdiction of this Court will lose an important part of their protection against retaliation. As a consequence, the Commission's

> ability to enforce Title VII will be compromised since some employees who would otherwise file charges will doubtless keep silent once they become aware that they have no statutory protection against the sort of harassment alleged by the plaintiff in this case. . . . The effect of the majority's decision is to rewrite the statute in a way that drastically weakens the protection Congress provided.

Brief of the Equal Employment Opportunity Commission as Amicus Curiae in Support of Petitions for Rehearing and Suggestion of Rehearing En Banc, No. 95-40836 (5th Cir.), pp. 4, 8, 9, 11, 14.

Judge Dennis correctly observed in his dissenting opinion that the majority's decision "will drastically weaken § 704(a)'s protection against retaliation for those who participate in the enforcement of Title VII by immunizing employers who use hostile environment discrimination vengefully against them." (App. 39a).

The Fifth Circuit rule at issue in this case has declared an open season on employees who complain to the EEOC or otherwise oppose discrimination. We set out below a list of recent district court decisions in the Fifth Circuit which have upheld as lawful a striking array of retaliatory measures:

Lewis v. Glickman, 1997 WL 276084 (E.D. La. 1997) (denial of access to merit promotion file; elimination of 60% of duties; removal of 9 of 14 subordinates; defamation; surveillance of employee).

Banks v. Commonwealth Title of Dallas, 1997 WL 242901 (N.D. Tex. 1997) ("unjustified verbal and written warnings").

Roark v. Kidder, Peabody & Co., 1997 WL 189131 (W.D. Tex. 1997) (screaming at complainant; spreading false rumors: refusal of supervisors to talk with complainant;

refusal to sign needed authorization forms; reprimanding complainant for actions for which co-workers were not criticized).

Smith v. Perry, 1997 WL 160293 (N.D. Tex. 1997) (refusal to put complainant's name on referral roster; lateral transfer).

Edmond v. Fujitsu-ICL Systems, Inc., 1997 WL 118406 (N.D. Tex. 1997) (placing complainant on probation; denial of request for change of shift; refusal to permit filing of internal grievance).

Watts v. Kroger Co., 955 F. Supp. 674, 686-87 (N.D. Miss. 1997) (reassignment to new duties).

Hopkins v. Nationwide Recovery Systems, Ltd., 1997 WL 42527 (N.D. Tex. 1997) (increasing production quota).

Bievere v. American Airlines, 1996 WL 560073 (E.D. La. 1996) (placing advisory warning in file; denial of vacation time; opposing workers compensation claim; delaying payment of salary and sick pay).

Larry v. North Mississippi Medical Center, 940 F. Supp. 960, 965 (N.D. Miss. 1996) (written warning; refusal to help complainant find other work).

Merriel v. Pena, 1996 WL 442279 (E.D. La. 1996) (maintaining file of derogatory remarks about complainant; harassment; actions to discredit complainant's job performance).

Hahn v. Bentsen, 1996 WL 383129 (E.D. La. 1996) (denial of training).

Clair v. Commissioner of Social Security, 1995 WL 608472 (E.D. La. 1995) (written reprimand).

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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Appendix

No. 95-40836
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
Filed Jan. 16, 1997

Jean G. MATTERN,

Plaintiff-Appellee,

EASTMAN KODAK COMPANY and Eastman Chemical Company, d/b/a Texas Eastman Company,

Defendants-Appellants.

No. 95-40836

Appeal from the United States District Court
for the Eastern District of Texas

Before GARWOOD, BARKSDALE and
DENNIS, Circuit Judges

RHESA HAWKINS BARKSDALE,
Circuit Judge:

The linchpin for this appeal is what constitutes an "ultimate employment decision" as required for a retaliation claim under Title VII of the Civil Rights Act of 1964, U.S.C. § 2000e-3(a). Eastman Kodak Company and Eastman Chemical Company (collectively "Eastman") contest the denial of a FED. R.CIV.P. 50 motion for judgment as a matter of law, a jury having found that Eastman had retaliated against Jean Mattern, its employee, but also having made two findings adverse to Mattern that limit her retaliation claim: first, that, although Mattern had been sexually harassed by her coworkers, Eastman did not fail to take prompt remedial action after it knew or should have known of the harassment, and second, that Mattern was not constructively discharged from her employment with Eastman. Mattern does not cross-appeal these adverse

findings. We REVERSE and RENDER.

I.

Mattern, an Eastman employee from late 1989 to mid-1993, was enrolled in Eastman's lengthy mechanic's apprenticeship program, which has two components: on-the-job training and related instruction (classroom). The program requires successful completion of 14 "review cycles" which evaluate both components. Satisfactory performance during the review cycles results in regular pay increases. In addition, the program includes periodic "Major Skills Tests". An apprentice who received either three unsatisfactory "review cycle" assessments or fails a skills test three times is subject to removal from the program.

Mattern filed a Title VII charge with the EEOC on March 11, 1993, claiming sexual harassment by members of her on-the-job training crew. She alleged that two senior mechanics, Godwin and Roberts, had sexually harassed her and created a hostile work environment. She further alleged that her supervisors knew of, and condoned, the harassment.

Earlier that month, Eastman had learned of, and began investigating, this charge. As a result, on March 11, it allowed Godwin to retire early; no action was taken against Roberts. Eastman then transferred Mattern to another crew in the department. Because of the transfer, Mattern was working under a different immediate supervisor, but her departmental supervisors remained the same. Mattern encountered difficulties which she equated, among other things, with Title VII proscribed retaliation. She resigned that July.

That November, Mattern filed this action against Eastman, alleging, *inter alia*, that it had a policy and practice of approving and condoning a hostile work environment; had constructively discharged her; and had retaliated, and

allowed its employees to retaliate, against her for reporting the harassment to the EEOC and for filing this action. The parties consented to trial before a magistrate judge.

A jury found that, although Mattern had been harassed by coworkers, Eastman had taken prompt remedial action; therefore, the hostile work environment sexual harassment claim failed. Likewise, it did not find constructive discharge or intentional infliction of emotional distress. (Mattern does not cross-appeal.) On the other had, it found retaliation and awarded $50,000 in damages.

II.

Eastman raises several issues. But first, we re-examine Mattern's jurisdictional challenge, premised on the timeliness *vel non* of Eastman's notice of appeal. *See e.g., Mosley v. Co. v. Cozby*, 813 F.2d 659, 660 (5th Cir. 1987). This challenge has already been rejected by a motions panel.

– A.

The verdict was returned on March 24, 1995. A week later, the magistrate judge entered a "Judgment" against Eastman on the retaliation claim, and, a week after that, April 7, Eastman moved under Rule 50 for judgment or for new trial, contending that the retaliation evidence was legally insufficient. Five days later, the magistrate judge entered a second "Judgment", dismissing Mattern's harassment and emotional distress claims; a week later, Mattern moved for judgment or for new trial. Two weeks later, she moved for attorney's fees as the prevailing party.

The court denied Eastman's Rule 50 motion on September 12. Three days later, it granted attorney's fees to Mattern, but denied her Rule 50 motion. That October 10, Eastman appealed the March 30 and april 12 "Judgments" and the September 12 and 15 orders. A "Final Judgment"

was entered on October 27; an "Amended Final Judgment", on November 2.

Mattern's early April 1996 motion to dismiss this appeal for lack of appellate jurisdiction, asserting that Eastman's notice was untimely, was repeated almost *verbatim* in her brief filed later in April while the motion was pending the approximately two weeks after Eastman's response to the motion. The motion was denied in early May, a week in advance of Eastman's reply brief, which, understandably, did not respond again to Mattern's jurisdictional challenge.

Of course, a panel hearing the merits of an appeal may review a motions panel ruling, and overturn it where necessary. *United States v. Bear Marine Services*, 696 F.2d 1117, 1119 (5th Cir. 1983). And, the merits panel must be especially vigilant where, as here, the issue is one of jurisdiction. *Id.* at 1120; *See also Commodity Futures Trading Comm'n v. Preferred Capital Inv. Co.*, 664 F.2d 1316, 1320-21 (5th Cir. 1982). On a parallel track, Mattern's motion appears to be driven, in part, by the dispute over the timeliness of her attorney's fees motion, an aspect of which might require deciding which of the several "Judgments" was *the* "judgment" for purposes of FED. R.APP.R. 54(d)(2)(B) (unless otherwise provided by statute, motion for award of attorney's fees must be filed within 14 days of entry of judgment).

As noted *infra*, we do not reach this fees-timeliness issue. Furthermore, we agree with the motions panel that the notice of appeal was timely. *See e.g.*, FED.R.APP.P. 4(a)(2) (notice of appeal filed after announcement of decision or order but before entry of judgment treated as filed on date of and after entry of judgment) and FED.R.APP. 4(a)(4) (timely motion under Rule 50(b), among others, tolls time for appeal until entry of order disposing of last such motion outstanding); FED.R.CIV.P.

50(b).

B.

At issue are the legal sufficiency of the retaliation evidence; evidence of pre-EEOC charge conduct by Mattern ruled inadmissible under FED.R.EVID. 412; and the attorney's fees award. Because the retaliation evidence was insufficient, we need not reach the other issues.

It goes without saying that the standard of review for Rule 50 motions for judgment is found in *Boeing Co. v. Shipman*, 411 F.2d 365 (5th Cir. 1969)(en banc):

> [T]he Court should consider all of the evidence—not just that evidence which supports the non-mover's case— but in the light and with all reasonable inferences most favorable to the party opposed to the motion. In the facts and inferences point so strongly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting [judgment as a matter of law] is proper.

Boeing, 411 F.2d at 374. To apply this standard, we look, of course, to the prerequisites for proving retaliation.

Title VII provides in relevant part that "[i]t shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he had made a charge . . . under this subchapter." 42 U.S.C. § 2000e-3(a). A retaliation claim has three elements: (1) the employee engaged in activity protected by Title VII; (2) the employer took adverse employment action against the employee; and (3) a causal connection exists between that protected activity and the ad verse employment action. *E.g.*, *Shirley v. Chrysler First, Inc.*, 970 F.2d 39, 42 (5th Cir. 1992). Eastman disputes the last two elements. We turn first to whether there was an "adverse employment action".

Basically, Mattern's retaliation proof is of five types. (In addition, Mattern testified that she was required to climb scaffolding in the fire protection suit that was too large, which she thought was unsafe; and that a telephone message was not give to her.) The special interrogatories did not require the jury to identify a basis, or bases, relied on in finding retaliation.

First, on the day Eastman brought disciplinary proceedings against Godwin, Mattern told her supervisor, Drennan, that she was ill, and that it was work related. Because it was work related, Drennan instructed her to report the illness to Eastman's medical department. Instead, Mattern went home, opting to take a day of vacation. Eastman then sent two of her supervisors, Drennan and Holstead (one of the supervisors named in Mattern's EEOC charge), to Mattern's house to instruct her to return to Eastman medical if her illness was work related. Sending supervisors to an employee's home under such circumstances was highly unusual, if not unprecedented.

Second, Mattern was reprimanded for not being at her work station approximately three weeks later, March 29, when her supervisors were looking for her. At the time, she was at Eastman's Human Resources Department discussing the hostility she was perceiving at Eastman.

Third, Matters's co-workers became hostile to her after Godwin departed. Mattern testified that they would not say "hello", and would mutter "accidents happen", that one supervisor (Holstead) told her he would fire her; and that her locker was broken into and some of her tools stolen. Mattern claimed that Eastman management knew of, but did nothing about, this hostility

Fourth, Mattern became ill as a result of her anxiety over this situation. Her doctor felt this was attributable to the hostility at Eastman. He telephoned Eastman to report

his concerns, but Eastman did not respond.

Fifth, Mattern's work was reviewed more negatively after her March EEOC charge, causing her to miss a pay increase, and therefore, in mid-May, to be on "final warning" of discharge from the apprenticeship program (she had missed another pay increase earlier in the apprenticeship). The poor evaluations were being completed and approved by supervisors who had praised her work in the past.

Many of the negative reviews, including the missed pay increase, resulted from Mattern's apparent inability to rebuild and realign centrifugal pumps. She also failed two Major Skills tests, scoring only 19% and 47%. If she were to miss another pay increase, or fail another Major Skills Test, she would be recommended for termination. But Mattern resigned her apprenticeship before her next evaluation and next test.

Before resigning, Mattern was assigned more work with pumps, including working one-on-one with a mechanic, Humble, in order to improve and evaluate her skills. They worked on one pump in particular, which they both testified was rebuilt correctly. Drennan, however, received a report from a mechanic, Roberts, whom Mattern accuses of bias, that the pump failed because of a reassembly defect. (As noted, Roberts was one of the co-workers Mattern named in the March EEOC charge.) Drennan documented the pump failure, and continued training Mattern.

Drennan instructed Mattern to attend a training session with another mechanic, Thomas. He told Mattern to realign a pump, which was resting on a wooden pallet, while he observed. After approximately three hours, she could not complete the task. A pump resting on a wooden pallet, as opposed to a more solid base, is more difficult to realign. In Mattern's view, it is reasonable to infer that the pump was deliberately placed on the pallet in order to

scuttle her efforts to realign it and continue to the next segment of the apprenticeship program.

As noted, the jury found against Mattern on her sexual harassment and constructive discharge claims. As also noted, those adverse findings limit the basis for finding retaliation. Accordingly, the retaliation claim must be viewed in the context of these two jury findings adverse to Mattern. Along this line, after the court instructed the jury on the sexual harassment and constructive termination claims it instructed on the retaliation claim. Concerning sexual harassment, the court instructed:

> Now in regard to Mrs. Mattern's Title VII claim of sexual harassment, Title VII ... prohibits employers from subjecting their employees to sexual harassment. This incudes unwelcome sexual advances, requests for sexual favors, other verbal or physical conduct of a sexual nature where the conduct has the purpose of effect of unreasonably interfering with the individual's work performance *or creating an intimidating, hostile or offensive working environment.*
>
> In order for Eastman to be liable to Mrs. Mattern for the actions of Eastman's employees, she must prove four things: first, that she was subjected to unwelcome harassment in the form of sexual advances, requests for sexual favors or other verbal or physical conduct of a sexual nature; secondly, that the harassment was based on her sex; and third, that the harassment affected a term, condition or privilege of her employment; and *finally, Eastman either knew or should have known that Mrs. Mattern was being sexually harassed and failed to take prompt reasonable measures to stop the harassment.*

> For sexual harassment to be actionable, *it must be sufficiently severe or persuasive [sic] to alter the conditions of her employment or create an abusive working environment.* The conduct must be objectively severe or persuasive [sic] that such a reasonable person would find the conduct, sexually hostile or abusive. Also, the employee must have subjectively considered the environment to be sexually abusive.

(Emphasis added.)

For constructive termination, the jury was instructed that Mattern "must prove that Eastern constructively discharged or terminated her in violation of Title VII *by proving that Eastman has made her working conditions so intolerable that a reasonable employee would feel compelled to resign*". (Emphasis added.)

And, for retaliation, the jury was instructed:

> In regard to her retaliation claim, Title VII . . . prohibits an employer from retaliating or discriminating against a person because that person has engaged in protective [sic] activity. Protective [sic] activity is an employee's conduct in opposing a discriminatory practice, making a charge of discrimination or testifying, assisting or participating in any manner in an investigation proceeding.
>
> Now, in order for Mrs. Mattern to prevail on her claim of retaliation, she has to prove three things: first, that she was engaged in a protective [sic] activity; second, she suffered from an adverse employment action; and third, that Eastman acted out of a retaliatory motive in taking adverse employment action.

> *Now, adverse employment action could be defined as a discharge, a demotion, refusal to hire, refusal to promote, reprimand, [or] acts of sabotage ... by employees against other employees, either condoned or directed by an employer for the purpose of establishing cause for discharge. Mere dirty looks or reluctance of co-workers to speak to an employee are not the types of adverse employment action prohibited by Title VII. Merely placing a memorandum regarding an employee's performance in his or her personnel file does not in itself constitute an adverse employment action.*

(Emphasis added.)

These instructions are not at issue on appeal. (The dissent totally ignores the "purpose of establishing cause for discharge" language in the retaliation instruction. Moreover, it grossly misstates our application of Title VII to the record in this case. In fact, the dissent seems to be dealing with another case entirely.)

Consistent with the retaliation instruction, our court has stated that "Title VII was designed to address ultimate employment decisions, not to address every decision made by employers that arguably might have some tangential effect upon those ultimate decisions", *Dollis v. Rubin*, 77 F.3d 777, 781-82 (5th Cir. 1995). "Ultimate employment decisions" include acts "such as hiring, granting leave, discharging, promoting, and compensating". *Id.* at 782 (citing *Page v. Bolger*, 645 F.2d 226, 233 (4th Cir.), *cert. denied*, 454 U.S. 892, 102 S.Ct. 388, 70 L.Ed.2d 206 (1981)). (No authority need be cited for the necessary and longstanding rule that, absent a change in the law, a decision by our court is binding on subsequent panels. There has not been such a change, most unfortunately, the dissent is simply unwilling to adhere to this rule. And, no matter the lengths to which it goes to distinguish *Dollis*, including expending

considerable effort discussing *Page*, it cannot get around the binding precedent established by *Dollis*.)

Right off the bat, several of the events of which Mattern complains, although viewed in the requisite light most favorable by her, all well below this standard. Hostility from fellow employees, having tools stolen, and resulting anxiety, without more, do not constitute ultimate employment decisions, and therefore are not the required adverse employment actions. *See Landgraf v. USI Film Prods*. 968 F.2d 427, 431 (5th Cir. 1992), *aff'd* 512 U.S. 244, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994).

In addition, these acts cannot be attributed to Eastman, especially when viewed in the light of the jury's remedial action and no constructive discharge findings. Moreover, there is no proof that these acts were by management. In general, Eastman cannot be held liable under Title VII absent proof that its employees acted as its agents. *See*, Title VII's definition of "employer", 42 U.S.C. § 2000e(b) (act covers "employers" and their "agents", not "employees"). In short, a reasonable juror could not find, as required by the retaliation instruction, that these acts were condoned or directed by Eastman for the purpose of establishing cause for discharge -- an ultimate employment decision.

Likewise, the other events, such as the visit to Mattern's home, the verbal threat of being fired, the reprimand for not being at her assigned station, a missed pay increase, and being placed on "final warning", do not constitute adverse employment actions" because of the lack of consequence. For starters, they do not meet the standard set out in *Dollis*.

There, the employee alleged that she: (1) was refused consideration for promotion; (2) was refused attendance at a training conference; (3) had her work criticized to a

government vendor; and (4) was given false information regarding aspects of her employment, including access to travel funds and methods of filing EEO complaints. *Dollis*, 77 F.3d at 779-80. In holding that these acts did not constitute ultimate employment decisions, our court held also that they were at most "tangential" to future decisions that might be ultimate employment decisions. *Id.* at 782.

Mattern's problems at Eastman are similarly non-actionable. While she may have been in jeopardy of discharge from her apprenticeship program at some point in the future, this possibility obviously does not equal being discharged. Failing two Major Skills Tests, having difficulty with pumps, and having documented reprimands in the file may have increased the chance that she would *eventfully* suffer an adverse employment action but, like the actions in *Dollis*, neither were they ultimate employment decisions nor did they rise above having mere tangential effect on a possible future ultimate employment decision.

To hold otherwise would be to expand the definition of "adverse employment action" to include events such as disciplinary filings, supervisor's reprimands, and even poor performance by the employee—anything which *might* jeopardize employment in the future. Such expansion is unwarranted. *See Whitaker v. Carney*. 778 F.2d 216 (5th Cir. 1985) *cert. denied*, 479 U.S. 813, 107 S.Ct. 65, 93 L.Ed.2d (1986)(refusing to expand coverage of Title VII anti-retaliation provision to include non-workplace hostility by non-employees).

Needless to say, *Dollis* is consistent with Title VII and prior case law. For example, *Hill v. Miss. St. Empt. Serv*, 918 F.2d 1233 (5th cir. 1990); *cert. denied*, 502 U.S. 864, 112 S.Ct. 188, 116 L.Ed.2d 149 (1991), held that allegations that co-workers were staring at the employee, following her, prolonging the time she had to wait for disbursement checks, relegating her file to a less desirable classification, deleting

experience data from a reference form, and criticizing her EEOC complaint did not constitute retaliation. *Hill*, 918 F.2d at 1241. Doubtless, some of these actions may have had a tangential effect on conditions of employment, but, as in Mattern's case, an ultimate employment decision had not occurred. The employee could only prove examples of the "many interlocutory or mediate decisions having no immediate effect upon employment conditions" which therefore were "not intended to fall within the direct proscriptions of ... Title VII". *Page*, 645 F.2d at 233. As another example, *see DeAngelis v. El Paso Mun. Police Officers' Ass'n*, 51 F.3d 591 (5th Cir.)(no adverse employment actions when office newsletter ran articles routinely ridiculing the plaintiff based on her gender, and her having filed an EEOC complaint), *cert. denied*, __ U.S. __, 116 S.Ct. 473, 133 L.Ed.2d 403 (1995).

The import of these cases, culminating in *Dollis*, is the long-held rule that Title VII's anti-retaliation provisions refers to ultimate employment decisions, and not to an "interlocutory or mediate" decision which can lead to an ultimate decision. Obviously, this reading is grounded in the language of Title VII. As quoted earlier, the anti-retaliation provision states that employers shall not "discriminate" against employees for taking action protected by Title VII. 42 U.S.C. § 2000e-3. In defining this term, we look, of course, to other Title VII sections for guidance; in this case, the preceding section is helpful.

That section states, in part, that it is unlawful to "fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment". 42 U.S.C. § 2000e-2(a)(1). This type of employer action contrasts sharply with the more vague proscription, found in the next subpart of "limitation" of employees which deprive or "would tend to deprive" the employee of "opportunities" or "adversely affect his status".

42 U.S.C. § 2000e-2(a)(1),(2). It goes without saying that this second subpart reaches much farther than the first. It reaches acts which merely "would tend" to affect the employee; obviously, the way in which the employee may be affected in this subpart is much broader. *Id.*

The anti-retaliation provision speaks only of "discrimination"; there is no mention of the vague harms contemplated in § 2000e-2(a)(2). Therefore, this provision can only be read to exclude such vague harms, and to include only ultimate employment decisions.

As discussed, another factor mandating the failure of Mattern's retaliation claim is that the jury found (1) she was not constructively discharged and (2) Eastman did not fail to take remedial action. (She does not cross-appeal.) She preempted a possible ultimate employment decision -- she resigned. *See Landgraf*, 968 F.2d at 431 (equating jury finding of no constructive discharge with no adverse employment action resulting in loss of position). Therefore, absent an ultimate employment decision prior to her resignation, there can be no adverse employment action.

The only event Mattern could possibly point to might be a missed pay increase. (Although there is evidence that Mattern missed two increases, one took place in November 1991, long before her March 1993 EEOC charge.) In any event, she did not prove that the increase would have taken effect by the time she resigned. In fact, she did not even assert in her brief in opposition to the Rule 50 motion, or in her brief here, that the missed pay increase was the ultimate employment decision. Instead, she contends that here problems at Eastman, including receiving poor evaluations and a missed increase, were "quickly *leading to the ultimate adverse employment action*". (Emphasis added.)

Moreover, at the time Mattern was receiving poor evaluations with respect to her work with pumps, she was

also failing Major Skills Tests with respect to them. She does not maintain (nor did she prove) that the tests were "rigged"; accordingly, we must assume they were a correct assessment of her ability with the pumps. Obviously, an employee may not complain that not obtaining a position was retaliation if she was not qualified for that position in the first place. *Gonzalez v. Carlin*, 907 F.2d 573 (5th cir. 12990). Therefore, the evidence that Mattern was having trouble in her Major Skills Tests precludes her contention that, but for the "sabotage", her progress through the pump section on the apprenticeship program would have been rapid. Mattern's missed pay increase evidence is not a basis for recovery on her retaliation claim.

In closing, we note that Mattern relies on *Armstrong v. City of Dallas*, 829 F.Supp. 875 (N.D. Tex. 1992), for the proposition that reprimands constitute ultimate employment decisions. The employer was granted summary judgment in *Armstrong* on the basis that the causation element for a retaliation claim was lacking. The district court stated in *dicta*, however, that an adverse employment action could rest on proof that the employee: (1) received a letter of reprimand; (2) had efficiency ratings cut; (3) was reported to the Civil Service Department for unsatisfactory performance; (4) was informed he could be terminated for failure to lose weight; (5) received a letter of reprimand for losing his firefighter's coat; and (6) *was transferred to a non-firefighting job*. *Id.* at 880.

Because of the lack of causation, our court affirmed the summary judgment, *Armstrong v. City of Dallas*, 997 F.2d 62 (5th Cir. 1993). Therefore, this court never reached whether the above-listed incidents constituted adverse employment actions. In short, Mattern relies erroneously on *dicta* by the *Armstrong* district court.

Even if the missed pay increase were an adverse employment action, Mattern's evidence is insufficient to

show that it resulted from retaliation. Otherwise, there was no adverse employment action. Because there was none, we need not reach whether Mattern proved the causation element. Likewise, she is not a "prevailing party" under Title VII, and is, therefore, not entitled to attorney's fees. 42 U.S.C. § 2000e-5(k).

III.

For the foregoing reasons, the denial of the motion for judgment is REVERSED, and judgment is RENDERED for Eastman.

REVERSED and RENDERED.

DENNIS, Circuit Judge, dissenting.

I respectfully dissent from the majority's reversal of the district court's judgment upholding the jury verdict awarding the plaintiff damages on her Title VII, § 704 retaliation claim and from the majority's appellate level entry of judgment as a matter of law against the plaintiff. The majority seriously misreads Title VII and judicial precedents in its double-edged holding that (1) when the jury rejects an employee-plaintiff's § 703 claims of sex discrimination and constructive discharge, it is legally barred from looking at all of the relevant circumstances and awarding her § 704(a) retaliation damages based on retributive hostile environment discrimination; and, (2) in such a case, in order to successfully prosecute § 704(a) retaliation claim, an employee must prove that the employer discriminated against her in an "ultimate employment decision" such as "hiring, granting leave, discharging, promoting, and compensating."

Correctly interpreted, § 704(a) affords an employee an independent hostile work environment retaliatory discrimination cause of action upon which she may recover

in a proper case regardless of the outcome of her § 703 sex discrimination and constructive discharge claims. In the present case the jury's retaliation award was not clearly erroneous and should have been affirmed. The evidence provided a sufficient basis for a reasonable juror to find that, after the plaintiff engaged in protected activity by filing a Title VII sexual harassment claim, adverse employment action against her occurred in the form of retaliatory discrimination (of which the employer knew or should have known) that was not remediated and sufficiently severe or pervasive as to alter the conditions of her employment and create a hostile or abusive working environment, and that there was a causal connection between her participation in the protected activity and the adverse employment action.

1. *Plaintiff's Hostile Environment Retaliation Claim is Independently Actionable*

Retributive harassment of an employee who has filed a § 703 sex discrimination and abuse claim constitutes retaliatory discrimination in violation of § 704(a) if, as in an actionable claim for sexual harassment under § 703, the employer knew or should have known of the harassment, failed to take remedial steps, and the abusive conduct was sufficiently severe so as to alter the conditions of employment and create a hostile work environment. The Supreme Court, in *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993), and *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986), made clear that a plaintiff may establish as violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment. Nothing in § 704(a) of Title VII suggests that hostile environment discrimination against an employee because she filed a charge alleging a sex discrimination violation should not be prohibited as unlawful retaliatory discrimination.

Jurists and legal scholars who have specifically

addressed the issue have reached the conclusion that retaliatory harassment of an employee because she reported sexual harassment may constitute retaliatory discrimination in violation of § 704(a) if the requisite elements are proven. *See., e.g., Davis v. State of Calif. Dept. of Corrections*, 1996 WL 271001 (E.D. Cal. Feb. 23, 1996); *Cobb v. Anheuser Busch*, 793 F.Supp. 1457, 1491 (E.D.Mo. 1990); *Toscano v. Nimmo*, 570 F.Supp. 1197, 1204-06 (D.Del. 1983); *Tanner v. Calif. Physicians' Serv.*, 27 F.E.P. 593, 1978 WL 210 (N.D.Cal. 1978); *EEOC v. Bank of Ariz.*, 12 F.E.P. 527, 1976 WL 1727 (D.Ariz. 1976); *Hyland v. Kenner Prod. Co.*, 13 F.E.P. 1309, 1976 WL 561 (S.D.Ohio 1976); LINDEMAN & KADUE, SEXUAL HARASSMENT IN EMPLOYMENT LAW at 282 (1992); 2 LARSON, EMPLOYMENT DISCRIMINATION § 34.04 at 34-57--34-62 (2d Ed. 1994)("Manipulation of such other employment conditions to constitute harassment or to tolerate harassment by fellow employees has likewise been perceived as retaliatory. Such harassment may take the form of interrogation, reprimands, surveillance, unwarranted or unfavorable job evaluations, or the deprivation of some of the normal benefits or rights of the position. . . .")(footnotes citing cases omitted); 1 CONTE, SEXUAL HARASSMENT IN THE WORKPLACE § 3.28 at 163-64 (1994). This court apparently has assumed that such liability could exist in analyzing a retaliation claim. *See DeAngelis v. El Paso Municipal Police Officers Assoc.*, 51 F.3d 591, 597 (5th Cir. 1995); *Hamilton v. General Motors corp.*, 606 F.2d 576, 581 (5th Cir. 1979); *see, also, Wilson v. Southern Nat. Bank of North Carolina*, 900 F.Supp. 803 (W.D.N.C. 1995)(same as to prompt remedial action).

The EEOC's administrative interpretations indicate that the employer can be held responsible under § 704(a) for failing to remedy or prevent co-worker or customer retaliation against a § 703 claimant if the retaliation subjectively and objectively creates severe or pervasive hostility in the claimant-employee's working environment. EEOC COMPLIANCE MANUAL § 614.7, in pertinent parts,

provides

614.7 *Examples of Forbidden Retaliation*

(a) *Introduction*—Retaliation against people who protest unlawful employment discrimination can take many forms. Discussed in this subsection are some of the more widely recognized types of forbidden retaliation. This list is not intended to be exclusive

* * * * * *

(c) *Harassment and Intimidation*—Harassing or intimidating an individual because that individual has opposed employment discrimination is a violation of § 704(a) and § 4(d). Harassment or intimidation can take many forms; some of the more common forms are set out below. (Also see § 165, Harassment; *see also* — 614.8(d) below);

* * * * * *

(4) Retaliatory reprimands. Unpublished Commission Decision No. 71-445 (1971).

(5) Coercive questioning. Commission Decisions No. 71-1151, CCH EEOC Decisions (1973) ¶ 6208. (See also *EEOC v. Plumbing and Pipefiters [sic] Industries, Local 189*, Title VII case.)

(6) Retaliatory surveillance. Commission Decision No. 70-683, CCH EEOC Decisions (1973) ¶ 6145.

(g) *Other Examples of Retaliation*— The following types of retaliation represent violations of

§ 704(a) and § 4(d) but do not come under any particular heading.

* * * * * *

(2)*Permitting others to retaliate against charging party or complainant*—If others, such as coworkers or respondent's customers, retaliate against charting party or complainant for having opposed employment discrimination, the respondent will, under certain circumstances, have a duty to take steps reasonably calculated to end the retaliation. For example, if a respondent knows or has reason to know of acts taken against a charging party by others because of his/her opposition to perceived discrimination, such respondent has an obligation to seek and end to the retaliation.

Id. (footnote omitted).

The EEOC has reached a similar position in administrative adjudications. *See EEOC Decision*, No. 79-59, 1979 WL 6935 (EEOC 1979); *Commission Decision* No. YME9-068, CCH EEOC Decisions (1973) ¶ 6039.

According to the Supreme Court, the Fifth Circuit's *Rogers v. EEOC*, 454 F.2d 234 (5th Cir. 1971), *cert. denied*, 406 U.S. 957, 92 S.Ct. 2058, 32 L.Ed.2d 343 (1972), was apparently the first case to recognize a cause of action based upon a discriminatory work environment. *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 65, 106 S.Ct. 2399, 2404-05, 91 L.Ed.2d 49 (1986). The Supreme Court quoted with approval from this court's explanation that an employee's protections under Title VII, § 703, extend beyond the economic aspects of employment:

> "[T]he phrase 'terms, conditions or privileges of employment' in [Title VII] is an expansive concept which sweeps within its protective ambit the practice of creating a working environment so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers..." 454 F.2d at 238.

Vinson, 477 U.S. at 66, 106 S.Ct. at 2405.

The Supreme Court in *Vinson* observed that courts generally applied the principle announced by *Rogers* to harassment based on race, religion and notional origin, *id.* at 65; that in 1980 the EEOC drew upon that substantial body of judicial decisions in issuing Guidelines specifying that sexual harassment creating a hostile work environment is prohibited by Title VII; and that "[s]ince the Guidelines were issued, courts have uniformly held, and we agree, that a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment." *Id.* at 65.

Thus, when this court, in *Whatley v. Metro Atlanta Rapid Transit Auth.*, 632 F.2d 1324 (5th Cir. 1980), first set forth the three-pronged test it follows on deciding Title VII, § 704(a), retaliation claims, the discriminatory work environment cause of action under § 703 was an established precedent of this court and many others. In *Whatley* this court held that to prove a prima facie case under section § 7-04(a), the plaintiff must establish (1) that there was a statutorily protected participation, (2) that an adverse employment action occurred, and (3) that there was a causal link between the participation and the adverse employment action. In doing so, we observed that:

> Section 704(a) of Title VII is the primary source of protection against retaliation for those who participate in the process of vindicating civil rights

> through Title VII. Under that section broad protection is afforded to the participant in order to effectuate the purposes of Congress. *Pettway v. Am. Cast Iron Pipe Co.*, 411 F.2d 998, 1006, n.18 (5th Cir. 1969)["The protection of assistance and participation in any manner would be illusory if employer could retaliate against employee for having assisted or participated in a Commission proceeding."]

Whatley, 632 F.2d at 1328 (footnote omitted). Consequently, it is inconceivable that this court, by its use of the shorthand judge-made term "adverse employment action," intended to exclude or legally could have excluded a cause of action based upon a discriminatory work environment from § 704(a)'s arsenal of protections for employee-complaints against all forms of retaliatory discrimination and adverse employment practices. In other words, co-worker harassment attributable to the employer that creates a hostile or abusive work environment for an employee because she opposed or complained of discrimination based on sex, race, color, national origin or religion, is a form of discrimination or adverse employment action prohibited by § 704(a).

Accordingly, an employee has an actionable retaliation claim under § 704(a) when (1) the employee participated in a statutorily protected activity; (2) the employee suffered harassment by co-workers (i) that was sufficiently severe or pervasive as to alter the conditions of the victim's employment and create a hostile or abusive work environment, and (ii) the employer knew or should have known of the harassment and failed to take reasonably calculated steps to end the abuse; and (3) there was a causal link between participation in the protected activity and the harassment creating the discriminatory work environment.

In assessing an employee's retaliation claim based on harassment creating a discriminatory work environment the

teachings of *Vinson* and *Harris* should be kept in mind. The discrimination prohibited by Title VII is not limited to economic or tangible discrimination. *Vinson*, 477 U.S. at 64, 106 S.Ct. at 2404. The discrimination must create an objectively and subjectively hostile or abusive work environment. *Harris* 510 U.S. at 17, 114 S.Ct. at 368. But Title VII comes into play before the harassing conduct leads to a nervous breakdown. Certainly Title VII bars conduct that would seriously affect a reasonable person's psychological well-being but the statute is not limited to such conduct. So long as the environment would reasonably be perceived, and is perceived, as hostile or abusive, there is no need for it also to be psychologically injurious. *Vinson*, 477 U.S. at 67, 106 S.Ct. at 2405-06. Whether an environment is "hostile" or "abusive" can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct, its severity, whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. *Id.*

2. *Application of discriminatory Work Environment Principles Requires That The Jury's Retaliation Award Be Affirmed*

We review jury verdicts for sufficiency of evidence pursuant to the standard articulated in *Boeing v. Shipman*, 411 F.2d 365, 374-75 (5th Cir. 1969)(en banc.) *Woodhouse v. Magnolia* Hosp., 92 F.3d 248 (5th Cir. 1996)(citing *Rhodes v. Guiberson Oil Tools*, 75 F.3d 989, 993 (5th Cir. 1966)(en banc)).

The plaintiff presented evidence that her employer was implicated in co-worker harassment of her because she had made prior complaints about sexual harassment by co-employees. The district court instructed the jury on the pertinent elements of Title VII and the nature of retaliatory discrimination under the statute. The jury specifically found

in its verdict in response to the court's interrogatories that the plaintiff was sexually harassed by her co-workers, that Eastman intentionally or wilfully retaliated against the plaintiff for filing a charge of discrimination and/or for filing this lawsuit, and that $50,000 would fairly and reasonably compensate the plaintiff for the damages proximately caused by Eastman's retaliatory actions. The evidence amply supports the jury's determinations and satisfies the three elements of a claim based on retaliatory discrimination under § 704(a).

First, it is undisputed that the plaintiff complained to the defendant's personnel department of coworker sexual harassment on or about March 3, 1993, and filed her initial Title VII charge on March 11, 1993.

Second, plaintiff presented sufficient evidence from which a reasonable trier of fact could find that after she complained of sex discrimination she was subjected to retaliatory harassment by co-workers that created a hostile or abusive work environment, about which the employer knew or should have known, and that the employer failed to take any steps reasonably calculated to end the retaliatory abuse. The majority accurately describes some of the principal parts of this evidence in its opinion. Mattern testified that she was required to wear a fire protection suit while claiming scaffolding that was unsafe because it was too large. Eastman sent two supervisors, one of whom was an alleged harasser, to her home, on a day she taken vacation leave after complaining of an employment-related illness, to tell or require her to return to Eastman Medical if her illness was job-related. Sending supervisors to an employee's home under such circumstances was highly unusual, if not unprecedented. Mattern was reprimanded for not being at her work station when she went to Eastman's Human Resources Department to complain that she was being harassed on the job. Mattern became ill over the perceived harassment; her doctor reported to Eastman that he was

concerned and that her illness was related to the hostility. Mattern's work was reviewed negatively by supervisors after he first EEOC charge, causing her to miss a pay increase and to be given a final warning of potential discharge from the apprenticeship program. The supervisors who began to give her poor marks had praised her work before her EEOC complaint. The plaintiff presented testimony by herself and Eastman's own personnel that tended to show that a pump she had rebuilt had been sabotaged by co-workers, causing her to receive a negative evaluation and have her job placed in jeopardy. The district court emphasized this incident in its reasons for denying the defendants' motion for a judgment as a matter of law and, alternatively, for a new trial:

> [T]ampering with another employee's work by another employee could reasonably be construed as sabotage condoned or directed by an employer for the purpose of establishing cause for discharge, demotion, reprimand or refusal to promote. This sabotage could have reasonably taken place in response to Ms. Mattern's actions regarding her complaints of sexual harassment. furthermore, at trial Ms. Mattern produced evidence that the defendants acted out of a retaliatory motive condoning the actions taken by other employees against Ms. Mattern. Therefore, the Court finds that there is a legally sufficient evidentiary basis for a reasonable jury to find for Ms. Mattern of her Title on her Title VII retaliation claim.

District Court's September 12, 1995, Order at 2-3.

Mattern points to additional evidence in the record that supports the jury verdict because it tends to prove co-worker harassment with the knowledge of the employer or direct harassment by the employer and a resulting hostile work environment after her initial Title VII complaint, she

was assigned to a different crew but returned to the same work area where her harassers were employed; she had a good work record and there was no complaint about her work before the Title VII charge; on March 30, 1993, her attorney sent a telefax to Eastman's counsel demanding that the retaliatory conduct cease; during March 1993 her doctor recorded that she suffered from depression and panic attacks; she testified that her work environment got worse after her complaint; that the other workers shunned her, gave her the silent treatment or muttered things like "accidents happen;" that one supervisor told her he would fire her; the doctor prescribed Zoloft and Prozac for her condition; the jury, in its last note sent during deliberation, asked: "May we award damages in answering Question #8 [pertaining to damages for retaliatory actions] because we think Eastman's credibility and witnesses lied?"

Third, the plaintiff's testimony and other corroborating factors provided a sufficient basis for the jury reasonably to find a causal link between her initial sexual harassment complaints and the subsequent harassment creating a discriminatory work environment. Among the corroborating factors were the evidence of sabotage of Mattern's work product by co-workers that the trial court emphasized in its reasons for judgment; the episode in which she was required to assemble a pump on the unsteady surface of a wooden pallet which caused her poor performance; the abrupt descent of the supervisors' evaluations of her work after the complaint was filed; her good work record up until that time; evidence that another apprentice had been allowed to fail tests and take more than the maximum allowable time to complete the program with no reprimand by management; the lack of any effective action by Eastman to stop the harassment of plaintiff despite several notifications to management level employees of the retaliatory acts by the plaintiff, her counsel, and her doctor.

Considering all of the circumstances, there was sufficient evidence for a reasonable trier of fact to find that the plaintiff was harassed by the employer directly through its supervisors, and indirectly by knowingly permitting co-worker harassment, because she had previously made informal and formal complaints of sexual harassment; that the retaliatory harassment occurred in the forms of retaliatory reprimands, retaliatory surveillance or confrontation and questioning at her home, and other acts of retaliation about which the employer knew or should have known but failed to take effective steps to remedy; that the harassment was sufficiently severe and pervasive to create a hostile or abusive work environment objectively and subjectively; and that there was a causal connection between her sexual discrimination complaints and the retaliatory harassment.

3. *The Majority Erroneously Conflates The Employee's § 703 Causes of Actio Based on Sex Discrimination and Constructive discharge With Her § 704(a) Retaliation Claim*

The majority errs seriously in holding that the jury's findings against an employee on her sexual harassment and construction discharge claims "limits the bases for finding retaliation," by narrowing the ambit of the employee's § 704(a) retaliation cause of action to one based on damage caused by the employer's "ultimate employment decisions" such as "hiring, granting leave, discharging, promoting, and compensating." It is perfectly plain that §§ 703 and 704(a) are separate and distinct provisions creating several independent causes of actions that serve different integral functions furthering the main purpose of Title VII. Section 703(a)(1) prohibits discrimination against any individual with respect to his compensation, terms, conditions, or privileges of employment because of race, color, religion, sex, or national origin. Section 704(a) prohibits discrimination against any employee because he opposed any practice made

an unlawful employment practice by Title VII or because he made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under Title VII. The primary purposes of Title VII are to prevent discrimination, achieve equal employment opportunity in the future, and to make victims of discrimination whole. A claim of "hostile environment" sexual harassment is a form of sex discrimination that is actionable under Title VII, § 703(a)(1). *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986). Section 704(a) of Title VII is intended to provide exceptionally broad protection for protestors of discriminatory employment practices. *Pettway v. Am. Cast Iron Pipe Co.*, 411 F.2d 998 (5th Cir. 1969). The Supreme Court has held that Title VII provides, in actions under "section 703, 704 or 717," that "the complaining party may recover compensatory and punitive damages..." *Landgraf v. USI Film Products*, 511 U.S. 244, __, 114 S.Ct. 1483, 1490, 128 L.Ed.2d 229 (1994)(emphasis added), 42 U.S.C. § 1981a(a)(West Supp. 1996).

The Fifth Circuit and other courts have recognized that the causes of actions afforded by §§ 703 and 704 are independent of each other, call for different elements of proof, and that the plaintiff's case under one cause of action does not depend upon her success under another. For example it is not fatal to a plaintiff's § 704(a) case that she failed to prove an unlawful employment practice under § 703(a)(1); it is sufficient to establish a prima facie case of retaliation if she had a reasonable belief that defendant had engaged in the unlawful practice. *Payne v. McLemore's Wholesale & Retail Stores*, 654 F.2d 1130 (5th Cir. 1981); *See EEOC Compliance Manual*, Section 614. Moreover, this court has recognized that there are significant differences between the employee's causes of actions for constructive discharge and for hostile work environment discrimination. To prove constructive discharge, the plaintiff must demonstrate a greater severity or pervasiveness of harassment than the minimum required to prove a hostile

working environment. *Landgraf v USI Film Products*, 968 F.2d 427 (5th cir. 1992), citing *Pittman v. Hattiesburg Mun. Separate Sch. Dist.*, 644 F.2d 1071, 1077 (5th Cir. 1981)(constructive discharge requires "aggravating factors"). Furthermore, the Fifth Circuit has held that a constructive discharge requires an actual intent to get rid of the employee; it occurs only "when the employer *deliberately* makes an employee's working conditions so intolerable that the employee is *forced* into an involuntary resignation." *Dornhecker v. Malibu Grand Prix Corp.*, 828 F.2d 307, 310 (5th Cir. 1987).

The majority's holding that an employee's failure to convince a trier of fact that she is entitled to relief under § 703 because of sex discrimination and constructive discharge limits the scope of her cause of action based on retaliation under § 704(a) is contrary to Congressional intent and departs from the settled precedents of this court. Moreover, it strikes a grievous blow to the entire enforcement mechanism of Title VII. As this curt stated in *Pettway v. Am. Cast Iron Pipe Company*, 411 F.2d 998, 1005 (5th cir. 1969):

> There can be no doubt about the purpose of § 704(a). In unmistakable language it is to protect the employee who utilizes the tools provided by Congress to protect his rights. The Act will be frustrated if the employer may unilaterally determine the truth or falsity of charges and take independent action.

4. *The Majority Misunderstands The Prior Cases Applying §§ 704(a) & 717 And Erroneously Limits Employees to Retaliation Claims Based on "Ultimate Employment Decisions."*

The majority erroneously fails to consider whether the evidence as a whole was sufficient to justify a reasonable trier of fact in finding that the plaintiff suffered retaliatory

discrimination prohibited by § 704(a) that created a hostile or abusive work environment. My colleagues were deflected from this course by their mistaken interpretation and application of dicta in cases decided under § 717: *Page v. Bolger*, 645 F.2d 227 (4th Cir. 1981), and *Dollis v. Rubin*, 77 F.3d 777 (5th Cir. 1995).

Title VII, § 717(a), in pertinent part, provides:

> (a) *Discrimination prohibited.* All personnel actions affecting employees or applicants for employment [in defined categories of Federal Government employment] shall be made free from any discrimination based on race, color, religion, sex, or national origin.

Congress added § 717 to Title VII in 1972 to extend the protection of Title VII to employees of the Federal Government. In *Chandler v. Roudebush*, 425 U.S. 840, 841, 96 S.Ct. 1949, 1950, 48 L.Ed.2d 416 (1976), the Supreme Court, in holding that § 717 affords federal employees the same right to a trial de novo as is enjoyed by private sector or state government employees under Title VII stated:

> In 1972 congress extended the protection of Title VII ... to employees of the Federal Government. A principal goal of the amending legislation [adding § 717 to Title VII] was to eradicate "entrenched discrimination in the Federal service.'" ... by strengthening internal safeguards and by according "(a)ggrieved (federal) employees or applicants ... the full rights available in the courts as are granted to individuals in the private sector under title VII."

Id. (citations and footnote omitted).

The majority mistakenly reads *Page v. Bolger* as holding that Congress, by adding § 717 to extend the

protection of Title VII to employees of the Federal Government, somehow restricted the protection of employees in the private sector by Title VII, § 703. According to the majority, *Page* reads a drastic limitation into § 703(a)'s broad prohibition against discrimination with respect to conditions of employment because of race, color, religion, sex, or national origin; *viz*, to recover under § 704(a) the employee must prove that he was discriminated against by the employer in an "ultimate employment decision" such as "hiring, granting leave, discharging, promoting, and compensating." Nothing in the statute or in *Page* justified such an interpretation.

In *Page v. Bolger*, a postal employee, who was twice denied promotions, brought suit against the Postmaster General claiming racial discrimination in violation of Title VII. The district court found that Page had failed to establish his claim of discrimination. The Fourth Circuit affirmed, concluding that the inference of discriminatory intent raised by plaintiff's prima facie case was effectively dispelled by articulation of a legitimate nondiscriminatory reason; *viz*, the better qualifications of the employees promoted, and that reason was not shown to be mere pretextual cover for a discriminatory motive.

In dictum, the *Page* court commented on a contention by the plaintiff that in effect introduced on appeal a new and dispositive theory neither advanced nor considered in a district court. The Postal Service's Personnel Handbook provides that a review committee shall be designated to screen the applicants and to recommend the most outstanding to the appointing officer. The official who designates a review committee is required to make every effort to select at least one women and/or one minority group member. The plaintiff argued for a modification of the *McDonnell Douglas* formula under which a claimant could establish a prima facie case by showing that he belonged to a minority; he qualified for the position; and he

was denied promotion because of an evaluation by a review committee consisting only of white males. At this point under the modification the employer would be required to articulate some nondiscriminatory reason for the absence of a minority member on the review committee, and, if this were done, the pretext inquiry would focus on this reason, rather than the articulated reason for denying the promotion.

The majority of the Fourth Circuit, *en banc*, rejected plaintiff's proposed modification its dictum stating:

> The proper object of inquiry in a claim of disparate treatment under § 717 is whether there has been "discrimination" in respect of "personnel actions affecting (covered) employees or applicants for employment. ..." 42 U.S.C. § 2000e-16(a) (emphasis added). Disparate treatment theory as it has emerged in application of this and comparable provisions of a Title VII, most notably § 703(a)(1), 42 U.S.C. § 2000e-2(a)(1), has consistently focused on the question whether there has been discrimination in what could be characterized as ultimate employment decisions such as hiring, granting leave, discharging, promoting, and compensating. This is *the general level of decision* we think contemplated by the term "personnel actions" in § 717.
>
> * * * * * *
>
> By this *we suggest no general test for defining those "ultimate employment decisions"* which alone should be held directly covered by § 717 and comparable antidiscrimination provisions of Title VII. Among the myriad of decisions constantly being taken at all levels and with all degrees of significance in the general employment contexts covered by Title

> VII *there are certainly others than those we have so far specifically identified* that may be so considered for example, entry into training programs. By the same token, ... *there are many interlocutory or mediate decisions having no immediate effect upon employment conditions* which were not intended to fall within the direct proscriptions of § 717 and comparable provisions of Title VII. We hold here merely that among the latter are mediate *position of the review committees* in the instant case that are simply steps in a process for making such obvious *end-decisions* as those to hire, to promote, etc.

Id. 645 F.2d at 233 (emphasis added)(citation omitted).

A careful reading of the Fourth Circuit's opinion indicates clearly that the court did not interpret § 717 to rule out a cause of action by an employee who had been subjected to discriminatory harassment based on race, sex, religion, color or national origin that created a hostile or abusive work environment. Instead, the Fourth Circuit's dictum states that § 717 does not prohibit discrimination in "interlocutory or mediate decisions having no immediate effect upon employment conditions" such as the composition of a review committee. Clearly, by implication, the court viewed § 717 as proscribing discrimination in "end-decisions" that have "immediate effect upon employment conditions," such as an employer's creation of a hostile environment discrimination based on sex, race, religion or national origin. The curt also expressly stated that the examples of unlawful employment actions immediately affecting employment conditions referred to, *viz*, discrimination in hiring, granting leave, discharging, promoting, and compensating, did not constitute an exclusive list. The court set forth these examples only to identify "the general level" of discrimination unlawful employment practices forbidden by § 717, not to suggest a "general test" for defining the types of discrimination barred by §§ 703, 704 and 717. At the

time of the *Page* court's decision the cause of action based on a discriminatory work environment was well established under § 703 at the same "general level" identified in the court's opinion. See *Vinson*, 477 U.S. at 65-66, 106 S.Ct. at 2404-05. That the *Page* court drew no distinction between § 717 and § 703 but treated them as equivalents further indicates the court did not interpret § 717 as excluding such a claim.[1]

In *Dollis v. Rubin*, 77 F.3d 777 (5th Cir. 1995), the plaintiff, an EEOC specialist in the U.S. Customs Service, brought suit against the Secretary of the Department of the Treasury, claiming race, sex, and retaliation discrimination in violation of Title VII, § 717. The magistrate granted summary judgment to the Secretary, rejecting Dollis' primary claim that she had been discriminatorily denied a desk audit

---

[1]In subsequent cases courts have disagreed with *Page*'s restriction of "adverse employment action" to mediate decisions and have limited its holding to Federal Government employment cases.

In *Hayes v. Shalala*, 902 F.Supp. 259-266 (D.D.C. Cir. 1995), the court noted that while its circuit had not directly addressed the holding in *Page*, "[w]here it has spoken, it has adopted broader interpretation of actionable 'personnel actions' than that of the Fourth Circuit." (Citing *Palmer v. Shultz*, 815 F.2d 84 (D.C. Cir. 1987)). The court concluded that the plaintiff employee "must be permitted to argue that the totality of actions taken by his employer collectively created a harassing and retaliatory environments, even if individual actions may not have left a permanent paper trail or may even had been 'mediate' employment decisions as identified by the Fourth Circuit in *Page*.

The court in *Howze v. Vir. Polytechnic*, 901 F.Supp. 1091, 1097 (W.D. Va. 1995), noted that *Page* "was not a retaliation case, but rather addressed an attempt to rewrite the prima facie case requirements in a failure to promote case. Second, the court was defining the term 'personnel actions' in 42 U.S.C.A. § 2000e-16(a), dealing with discrimination in federal employment. ... There is no indication that the Fourth Circuit intended this definition to apply to the retaliation provision in section 2000e-3(a).

and her retaliation discrimination claims based on her employer's alleged acts or omissions in giving her false information about the return of a self-nomination for an award for the Federal Women's Program, informing her of the requirement that the EEO Manager approve each handwritten document prepared by her, and informing a vendor of an incorrect procurement procedure taken by her. This court affirmed on the ground that neither the denial of the desk audit nor the alleged retaliations arose to the level of an adverse personnel action or an ultimate employment decision, *citing Page v. Bolger*. *Id.* at 781.

Dollis is clearly distinguishable from the present case because Dollis did not claim that she had been subjected to retaliatory harassment that was sufficiently severe or pervasive to create a discriminatory hostile or abusive work environment. Moreover, under the facts alleged and shown by Dollis, it is clear that no reasonable trier of fact could have found both objective and subjective perceptions that the environment was abusive. Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation. *Harris*, 510 U.S. at 21-22, 114 S.Ct. at 370-71.

Nor do any of the other cases relied upon by the majority opinion hold or support the majority's implicit holding that acts of harassment and discrimination by co-workers attributable to the employer creating a hostile environment cannot collectively rise to a level of severity or pervasiveness to constitute discrimination prohibited by Title VII, § 704(a):

(1) In *Landgraf v. USI Film Prods.*, 968 F.2d 427, 431

(5th Cir. 1992), *aff'd*, 511 U.S. 244, 114 S.Ct. 1483, 128 F.Ed.2d 229 (1994), this court affirmed the district court's findings that the plaintiff suffered severe enough sexual harassment from one male co-worker, a machinist, to create a hostile work environment, but that the conflicts and unpleasant relationships plaintiff had with other co-workers were not related to the charge she filed complaining of the machinist's sexual harassment; therefore, this court concluded, the plaintiff's conflicts with the other co-workers could not constitute an underlying basis for her retaliation claim.

(2) *Whitaker v. Carney*, 778 F.2d 216 (5th Cir. 1985), held that Title VII does not prevent an employer for disclosing to the complained-of individual sexual harassment in employment complaints made to the employer by its employees, and that, consequently, Title VII provides no basis for appellants' attempted removal to federal court under the federal civil rights removal statute on the asserted ground that to comply with appellee's state Open Records Act request would be an act inconsistent with a law providing for equal rights. Therefore, *Whitaker* is irrelevant here and did not refuse to expand coverage of Title VII's anti-retaliation provision as the majority opinion indicates.

(3) *Hill v. Miss. St. Empl. Serv.*, 918 F.2d 1233 (5th cir. 1990) *did not hold*, as the majority claims, that plaintiff's allegations that co-workers stared at her, followed her, delayed her disbursement checks, relegated the classification of her file, deleted experience data from her employment referral form, and criticized her EEOC complaint failed to constitute retaliation. Instead, this court held that the trial magistrate's finding that the plaintiff failed to prove these alleged facts was not clearly erroneous. *Id.*, 918 F.2d at 1241. Furthermore, this court's discussion of the retaliation claim in *Hill* does not mention or allude to ultimate, interlocutory or mediate employment decisions as the majority suggests. *Id.*, 918 F.2d at 1240-41.

(4) In *DeAngelis v. El Paso Municipal Police Officers Assn.*, 51 F.2d 591 (5th Cir. 1995), this court set forth the criteria for a Title VII hostile environment sex discrimination claim as: (a) Sexually discriminatory intimidation, ridicule and insults, which are (b) sufficiently severe or pervasive that they (c) alter the conditions of employment and (d) create an abusive working environment, citing *Harris* and *Vinson*, *id.*, 51 F.3d at 593, and held that the anonymous comments in ten columns of a police officer association's newsletter directed toward plaintiff and female officers in general were not so frequent, pervasive, or pointedly insulting as to create a hostile working environment; and that a reference in one of the columns to plaintiff's "E-I-E-I-O" [EEOC] complaint and an article reporting the association's intention to sue her for damages if her lawsuit proved groundless did not amount to an adverse employment action under any reasonable meaning of that term. *Id.*, 51 F.2d 3d at 597.

(5) In *Gonzalez v. Carlin*, 907 F.2d 573 (5th cir. 1990), the plaintiff claimed that the Postal Service had discriminatorily failed to promote him because of his national origin, but he failed to present a prima facie case because the evidence showed that he had not yet acquired the two-year mechanical, electrical and electronic experience necessary to qualify for the Level 6 MPE maintenance mechanic position. For the same reason, his claim that his failure to receive the desired promotion was based on retaliatory motive was also rejected. The case has little, if any, relevance to an employee's claim that, as in the present case, is based on the employer's retaliatory conduct, directly and through employees for whom he is accountable, that is sufficiently severe or pervasive to create a discriminatorily hostile or abusive working environment.

CONCLUSION

The majority opinion is in conflict with the aim of

Congress in enacting Title VII. Section 703 of Title VII makes it unlawful for an employer to "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." Section 704 of Title VII makes it unlawful for "an employer to discriminate against any of his employees ... because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title." The Supreme Court has emphatically held that Title II, § 703, is violated when the employer discriminates on the basis of sex by creating a hostile or abusive work environment, which "can be determined only by looking at all the circumstances." *Harris*, 510 U.S. at 23, 114 S.Ct. at 371. Consequently, it necessarily follows that Title VII, § 704, is violated when all the circumstances show that the employer has discriminated against an employee for participating in the enforcement of Title VII by creating a hostile or abusive work environment. There is no justification for recognizing hostile environment discrimination based on all circumstances under one section and not the other. Nor is there any justification for interpreting Title VII to afford less protection against retaliatory discrimination than against sexual, racial or other types of forbidden discrimination. This court has constantly recognized that, to effectuate the purposes of Congress, § 704(a) affords broad protection against retaliation for those who participate in the process of vindicating civil rights through Title VII. *See, e.g., Whatley v. Metro. Atlanta Rapid Transit Auth.*, 632 F.2d 1325 (5th Cir. 1980); *Pettway v. Am. Cast Iron Pipe Co.*, 411 F.2d 998 (5th Cir. 1969).

Nevertheless, the majority has produced a holding that prevents a judge or jury from considering all the circumstances in retaliation cases and thereby severely impairs the cause of action based upon a discriminatory work environment under Tile VII, § 704(a). The holding is based on the majority's mistaken interpretation of two judge-

made terms that were never intended for the use my colleagues make of them. There is nothing to indicate that this court intended to narrow the scope of protection against retaliatory discrimination afforded by § 704(a) when it adopted the shorthand term, "adverse employment action," to assist its analysis of retaliation claims. Nor is it correct to conclude, as the majority must have, that the *Page* court had the authority and the intention, by its judge-minted term, "ultimate employment decision," to drastically narrow the meaning of discrimination under §§ 703 and 717, effectively abolishing altogether the cause of action based on a discriminatory work environment. Unfortunately, the majority has allowed its mistaken interpretation of the judge-made rules to lead it to an incorrect conclusion as to the meaning of Title VII.

Because I believe that the majority's decision is contrary to the clear statutory language, the Supreme Court decisions, and all prior jurisprudence, and that it will drastically weaken § 704(a)'s protection against retaliation for those who participate in the enforcement of Title VII by immunizing employers who use hostile environment discrimination vengefully against them, I must respectfully dissent.

No. 95-40836
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
Filed Apr. 22, 1997

JEAN G. MATTERN,

Plaintiff-Appellee,

v.

EASTMAN KODAK CO; EASTMAN CHEMICAL COMPANY, doing business as Texas Eastman Co.,

Defendants-Appellants.

Appeal from the United States District Court
for the Eastern District of Texas, Marshall Division

ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC

(Opinion 1/16/97, 5th Cir., 1997, ___ F.3d ____)

Before GARWOOD, BARKSDALE, AND DENNIS, Circuit Judges

PER CURIAM

(X) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FRAP and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor, (FRAP and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT

S/_____
United States Circuit Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

JEAN G. MATTERN,

Plaintiff-Appellee,

v. CIVIL ACTION NO. 2:93cv189

EASTMAN KODAK COMPANY,
EASTMAN CHEMICAL COMPANY
D/B/A EASTMAN COMPANY,

Defendants-Appellants.

ORDER

Came on for consideration defendants' Eastman Kodak Company, Eastman Chemical Company, D/B/A/ Texas Eastman, Motion for Judgment as a Matter of Law and Alternatively a Motion for a New Trial. Defendants assert that there is no legally sufficient evidentiary basis for a reasonable jury to find for Ms. Mattern on her Title VII claim.

Although Rule 50 of the Federal Rules of Civil Procedure has been amended to replace the terms "directed verdict" and "judgment notwithstanding the verdict" with the term "judgment as a matter of law," the standard to determine whether evidence is sufficient to justify submitting a case to jury is long established and unchanged in this regard:

> On motions for directed verdict and for judgment notwithstanding the verdict the Court should consider all of the evidence—not just that evidence

> which supports the non-mover's case—but in the light and with all reasonable inferences most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the motions is proper. On the other hand, if there is substantial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motions should be denied, and the case submitted to the jury. A mere scintilla of evidence is insufficient to present a question for the jury.

Boeing Co. v. Shipman, 411 F.2d 365, 374 (5th Cir. 1969)(en banc).

Furthermore, in order for a party to succeed on a claim of retaliation under Title VII, that party must prove: 1) that the employee engaged in a protected activity under Title VII; 2) that the employee suffered an adverse employment action; and 3) that the employer acted out of a retaliatory motive in taking the adverse action. *Grizzle v. Travelers Health Network, Inc.*, 14 F.3d 261, 267 (5th Cir. 1994).

The defendants' motion is not well taken. At the trial, Ms. Mattern presented the testimony of Eastman personnel who stated that the pump in which Ms. Mattern rebuilt must have been tampered with because the pump was functioning when she completed rebuilding and that it was impossible for the pump to be have been put together incorrectly. This alleged tampering led to the plaintiff receiving a negative evaluation in her employment records and the alleged threat made by a supervisor that Ms. Mattern would soon be fired. Although placement of a

negative memoranda in Ms. Mattern's employment file and oral threats of termination may not have been considered an adverse employment action, tampering with another employee's work by another employee could reasonably be construed as sabotage condoned or directed by an employer for the purpose of establishing cause for discharge, demotion, reprimand or refusal to promote. This sabotage could have reasonably taken place in response to Mr. Matter's actions regarding her complaints of sexual harassment. Furthermore, at trial, Mr. Mattern produced evidence that the defendant acted out of a retaliatory motive in condoning the actions taken by other employees against Ms. Mattern. Therefore, the Court finds that there is a legally sufficient evidentiary basis for a reasonable jury to find for Ms. Mattern on her Title VII retaliation claim.

Furthermore, defendants assert that in the alternative, they are entitled to a new trial. Whenever a trial court considers a motion for a new trial it may weigh the evidence presented to the jury. *Bazile v. Bisso Marine Co.*, 606 F.2d 101, 105 (5th cir. 1979), *cert. denied*, 449 U.S. 829, 101 S.Ct. 94, 66 L.Ed.2d 33 (1980). A party may be entitled to a new trial if the verdict is against the "great weight" of the evidence. *Scott v. Mansanto Co.*, 868 F.2d 786, 791 (5th Cir. 1989). To an extent, then, the trial court substitutes its judgment of the facts and of the credibility of the witnesses for that of the jury. *Massey v. Gulf Oil Corp.*, 508 F.2d 92, 95 (5th Cir.), *cert. denied*, 423 U.S. 838, 96 S.Ct. 46 L.Ed.2d 57 (1975). A jury has the "undoubted power to sift the evidence before it and to believe or disbelieve portions of the testimony of various witnesses (or even of the same witness) in constructing its own view of what most probably happened." *Conway v. Chemical Leaman Tank Lines Inc.*, 610 F.2d at 360. Against the great weight of the evidence is a confining standard; a lesser standard would damage the jury's role as the principal trier of fact. *Spurlin v. General Motors Corp.*, 528 F.2d 612, 620 (5th cir. 1976). Issues of credibility, considered by the trial court in this context, are

more akin to evaluations of the weight of the evidence than to evaluations of the believability of various witnesses. *See Massey*, 508 F.2d at 94 & n.1.

Considering the standards outlined above and in weighing the evidence presented at trial, the court finds that the jury's findings regarding Ms. Mattern's retaliation claim are not against the great weight of the evidence and therefore a new trial is not justified.

It is hereby

ORDERED that defendants', Eastman Kodak company, Eastman Chemical Company, D/B/A Texas Eastman, Motion for Judgment as a Matter of Law and Alternatively a Motion for a New Trial be DENIED.

SIGNED this 12th day of September, 1995.

/S/
HARRY W. McKEE
UNITED STATES MAGISTRATE JUDGE

Supreme Court, U.S.
FILED
SEP 19 1997
CLERK

(2)

No. 97-126

In The

Supreme Court of the United States

October Term, 1996

JEAN G. MATTERN,

Petitioner,

vs.

EASTMAN KODAK COMPANY, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Section 704(a) of Title VII of the Civil Rights Act of 1964 prohibits employers from "discriminat[ing] against" employees who challenge perceived violations of other prohibitions in Title VII. Does § 704(a) permit an employee to obtain relief for alleged employer conduct that results in no objective detrimental effect on the employment relationship?

PARTIES TO THE PROCEEDING

The petitioner is Jean G. Mattern, plaintiff-appellee below.

The named respondents, defendants-appellants below, are "Eastman Kodak Company and Eastman Chemical Company doing business as Texas Eastman Company." As stipulated below, the correct defendant was Eastman Chemical Company, of which Texas Eastman Company is a division. VII R. 7-8. Eastman Kodak Company has no interest in this case.

Eastman Chemical Company has no parent company. The following are nonwholly owned subsidiaries of Eastman Chemical Company: Genencor International Inc.; HDK Industries; Kingsport Hotel Limited Liability Corporation; Primester; Southern BioSystems, Inc.; Enterprise Genetics, Inc.; and Bellpack.

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STATEMENT OF THE CASE*

Mattern sued Eastman, her former employer, alleging that the company violated Title VII of the Civil Rights Act of 1964 ("Title VII") by sexually harassing her, retaliating against her for complaining about the harassment, and constructively discharging her. She also alleged that Eastman's conduct constituted intentional infliction of severe emotional distress under Texas law. A jury in Marshall, Texas found that Mattern had been sexually harassed by coworkers but that Eastman had taken prompt remedial action. The jury also found that Eastman had neither constructively discharged Mattern nor intentionally inflicted emotional distress. On her retaliation claim, the jury found "that Eastman intentionally or willfully retaliated against Jean Mattern for filing a charge of discrimination and/or for filing this lawsuit" but went on to find that Eastman had acted without malice, willfulness, or reckless indifference to Mattern's rights. The jury awarded Mattern $50,000 in actual damages on the retaliation claim. The magistrate judge later awarded Mattern attorneys' fees, interest, and costs.

On appeal, the United States Court of Appeals for the Fifth Circuit, with Judge Dennis dissenting, held that Mattern had failed to adduce legally sufficient evidence of an "adverse employment action," an essential element of her retaliation claim. The court also held that several of the alleged actions Mattern complained of failed to support the verdict on other grounds. The Fifth Circuit reversed the trial court's judgment and rendered judgment in Eastman's favor. On Mattern's petition for rehearing and suggestion for rehearing *en banc*, no active judge of the Fifth Circuit requested a poll of the full court. Accordingly, her suggestion was denied, as was her petition for rehearing.

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* The petitioner will be referred to as Mattern. The respondent will be referred to as Eastman.

Mattern's statement of the case seriously misrepresents the facts. The first paragraph is devoted to describing her sexual harassment complaint. The details of the sexual harassment allegations, however, have nothing to do with the retaliation issue before the Court. Mattern also describes her accusations as established fact. She says she was "repeatedly assaulted by two senior company mechanics" and was "regularly" "spanked" by one, all in plain view of her supervisor. But the jury obviously did not accept Mattern's version of events. It found only that at least one of Mattern's coworkers sexually harassed her. That finding does not entitle Mattern's counsel to describe as "facts" what are, for the most part, hotly disputed allegations. The jury's verdict actually demonstrates that it discredited much of Mattern's evidence. For example, Mattern accused at least two coworkers, John Godwin and George Roberts, of sexual harassment. But as she points out, Eastman took disciplinary action only against Godwin. Yet the jury found that the company had promptly remedied the sexual harassment. The jurors thus could not have believed Mattern's accusations against Roberts.

Mattern likewise describes inaccurately the events leading to Godwin's separation from employment. She says that "high ranking company officials asked Godwin to take early retirement." *Petition* at 2. That is incorrect. The disciplinary committee that convened to decide the appropriate discipline for Godwin recommended discharge. IX. R. 235-39, 246-47 & Dx. 18. At *his* request, however, Eastman permitted Godwin to retire instead. *Id.* at 239.

Mattern's discussion of her retaliation claim is equally misleading. She describes every alleged instance of retaliation as though she had proven each occurred. But, again, the jury did not decide whether each incident happened as Mattern asserted or whether any of the incidents it did believe happened were motivated by retaliation. Rather, the jury simply found that Mattern had been retaliated against. Given its adverse findings on Mattern's constructive-discharge and intentional-infliction-of-emotional

distress claims as well as its decision that the retaliation it found was not willful, malicious, or recklessly indifferent, it seems unlikely that the jury believed all of Mattern's retaliation allegations.

Mattern also says she repeatedly complained about the alleged retaliation but that company officials responded there was nothing they could or would do about it. *Petition* at 4. She leaves out that those same officials testified that Mattern would not provide them the details they needed to take appropriate action to remedy any inappropriate conduct toward her. VII R. 288-89; IX R. 63-64, 246. She likewise does not mention the company's transferring her to another work group and threatening to fire any of her coworkers who retaliated against her. VII R. 174; IX R. 59-62, 138. Mattern finally says that the alleged retaliation "soon drove [her] from the plant." *Petition* at 3. But the jury found that she was *not* constructively discharged.

It is one thing to describe a party's version of the facts — either by specifically identifying the description as such or by explaining what some of the evidence was — and then to assume that version true for purposes of a legal argument. But it goes beyond proper advocacy to relate bare accusations as fact.

REASONS FOR DENYING THE WRIT

I.

THE CIRCUMSTANCES OF THIS CASE MAKE REVIEW INAPPROPRIATE.

The circumstances that led to the reversal of the jury's verdict make this case an inappropriate vehicle for review of the issue stated in the petition. Those circumstances include the jury's unchallenged findings against Mattern, the instructions given to the jury without objection, and the legal theory Mattern elected to pursue.

The jury found "that Eastman intentionally or willfully retaliated against Jean Mattern for filing a charge of discrimination and/or for filing this lawsuit." But the jury also decided that Eastman had *not* "violated [Mattern's] rights under Title VII with malice or willfulness or reckless indifference to those rights" despite the finding of intentional or willful retaliation. The jury went on to find that Eastman had not constructively discharged Mattern, meaning, under the instructions given to the jury without objection, that Eastman had not "made her working conditions so intolerable that a reasonable employee would feel compelled to resign." Because of that finding, Mattern's retaliation claim necessarily was limited to alleged conduct *other* than an actual or constructive discharge.

Her claim was further constrained by the legal theory she chose to pursue. To prove sexual harassment, she alleged a "hostile work environment": she attempted to show that a number of events, considered together, created a discriminatorily abusive working environment. *See Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 114 S. Ct. 367 (1993); *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 106 S. Ct. 2399 (1986). " 'A hostile work environment claim is a single cause of action rather than a sum total of a number of mutually distinct causes of action to be judged each on its own merits.' " *DeNovellis v. Shalala*, __ F.3d __, 1997 WL 527912, at * 10 (1st Cir. Sept. 2, 1997) (quoting *Vance v. Southern Bell Tel. and Tel. Co.*, 863 F.2d 1503, 1511 (11th Cir. 1989)). The jury was instructed on and decided Mattern's sexual harassment cause of action under that theory. App. 8a-9a.

But Mattern did not plead or ask for submission of a hostile-work-environment theory on her retaliation claim. She alleged instead a number of distinct events each of which she hoped to prove constituted retaliatory action attributable to Eastman. The instructions the magistrate judge gave to the jury illustrate the difference in theories. The instruction on sexual harassment defined prohibited conduct as including conduct that "has the purpose or

effect of unreasonably interfering with the individual's work performance or creating an intimidating, hostile or offensive working environment" and covered the objective and subjective tests for hostile-work-environment harassment established by this Court in *Harris*. App. 8a-9a. The instruction on retaliation, in contrast, does not even hint at a hostile-work-environment theory: it told the jury that Mattern had to prove, among other things, an "adverse employment action" and did not define that term using any of the standards from hostile-work-environment cases. App. 9a-10a. Mattern did not object to the instructions, so she cannot now characterize her retaliation claim as one based on hostile-work-environment harassment.

Having chosen not to assert a hostile-work-environment claim, Mattern could defend the retaliation verdict only by treating separately each alleged retaliatory action. That is, the lower courts were obliged to assess each alleged incident of retaliation as though it were the only one on which the verdict was based, just as in the case of an employee who asserts claims for failure to promote and discharge. Moreover, because the jury failed to find a constructive discharge, Mattern could not justify the verdict as compensation for the loss of her job. The courts below were therefore confined to deciding whether an employee who had voluntarily left employment could obtain Title VII relief against a former employer for any one of the retaliatory actions asserted by Mattern considered in isolation from the others.

That Mattern did not plead or try to have submitted a hostile-work-environment retaliation claim is lost in the rhetoric of her petition, as it was in Judge Dennis's dissent below. Mattern groups the alleged retaliatory actions, often uses the term "harassment," and relies on cases concerning harassment to attack the Fifth Circuit's opinion and argue that the circuit courts are in conflict. She also relies on the Equal Employment Opportunity Commission's position that retaliatory harassment is actionable.

She quotes from and refers to Judge Dennis's dissent, which argued at great length that Mattern could prevail on a claim for hostile-work-environment retaliation without once acknowledging that she had not asserted such a claim. And she repeatedly contends that the Fifth Circuit "permits" retaliation, has "approved" and declared "lawful" a variety of retaliatory conduct, and has "declared an open season on employees who . . . oppose discrimination." The Fifth Circuit majority in fact said nothing about whether Mattern would have been able to recover under Title VII had she pursued a claim of hostile-work-environment retaliation and proved it under the analysis established in *Meritor Savings Bank* and *Harris*.[1]

Moreover, review by this Court could not change the outcome for Mattern. She waived any complaint about being required to prove an "adverse employment action" or about the definition of that term. The jury instructions required Mattern to prove an adverse employment action and defined such an action in the very way she objects to now:

> [A]dverse employment action could be defined as a discharge, a demotion, refusal to hire, refusal to promote, reprimand, [or] acts of sabotage . . . by employees against other employees, either condoned or directed by an employer for the purpose of establishing cause for discharge. Mere dirty looks or reluctance of co-workers to speak

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1. *Cf. Williams v. J.B. Parks Wholesale Florist, Inc.*, 1997 WL 160194, * 6 (N.D. Tex. March 31, 1997) (distinguishing Fifth Circuit's opinion and holding that hostile-work-environment retaliation is actionable); *Easley v. West*, 66 Fair Empl. Prac. Cas. (BNA) 1634, 1643 (E.D. Pa. 1994) (applying-hostile-work environment standards to retaliation claims under Title VII and Rehabilitation Act of 1973); *Henry v. Guest Servs., Inc.*, 902 F. Supp. 245, 251-52 (D.D.C. 1995) (applying hostile-work-environment standards to retaliation claim under Americans with Disabilities Act of 1990), *aff'd*, 98 F.3d 646 (table), 1996 WL 560362 (D.C. Cir. 1996).

> to an employee are not the types of adverse employment action prohibited by Title VII. Merely placing a memorandum regarding an employee's performance in his or her personnel file does not in itself constitute an adverse employment action.

App. 9a-10a. As the Fifth Circuit observed, Mattern did not object to that instruction before the magistrate judge, nor did she challenge it on appeal. App. 10a.

The failure to object to a jury instruction waives any error concerning the instruction. Fed. R. Civ. P. 51. Unobjected-to instructions, right or wrong, become the law insofar as the particular case is concerned, unless the party has preserved error by a motion for directed verdict or for judgment as a matter of law. *Moore v. Murphy*, 47 F.3d 8, 11 (1st Cir. 1995); *Sims v. Mulcahy*, 902 F.2d 524, 536 (7th Cir.), *cert. denied*, 498 U.S. 897, 111 S. Ct. 249 (1990); *cf. Boyle v. United Tech. Corp.*, 487 U.S. 498, 513-14, 108 S. Ct. 2510, 2519 (1988) (failure to object is not fatal when party who failed to object raises issue by motion for judgment or directed verdict); *St. Louis v. Praprotnik*, 485 U.S. 112, 118-20, 108 S. Ct. 915, 921-22 (1988) (same); *Hystro Prods., Inc. v. MNP Corp.*, 18 F.3d 1384, 1392 n.6 (7th Cir. 1994) ("party need not object to jury instructions to urge a j.n.o.v. based on different standards"). So Mattern's challenge to the Fifth Circuit's discussion of adverse employment action could not help her. Even if this Court decided that the Fifth Circuit's definition was incorrect in the abstract, Mattern still would be bound by the very similar definition given to the jury, and her claim still would fail under that definition, as the Fifth Circuit correctly held.

In addition, several of Mattern's claims cannot succeed because of alternative holdings by the Fifth Circuit that she does not challenge. Her claims of retaliation based on alleged hostility from

fellow employees or having tools stolen fail because the Fifth Circuit held the evidence legally insufficient to permit a jury to find that those events were attributable to Eastman under *respondeat superior* principles. App. 11a. Her retaliation claim based on a missed pay increase, which the Fifth Circuit thought might be an adverse employment action in some situations but was not under the circumstances, App. 14a-15a, also fails independently of the adverse-employment-action holding. The Fifth Circuit held that the evidence was legally insufficient to show that the missed pay increase resulted from a retaliatory motive. App. 15a-16a.

In light of the case-specific circumstances that constrained the Fifth Circuit's review of Mattern's claim, the Court should deny the writ.

II.

THERE IS NO REAL AND SUBSTANTIAL CONFLICT IN THE CIRCUITS THAT WARRANTS THIS COURT'S REVIEW.

Upon separate consideration of the alleged actions on which Mattern based her retaliation claim, the Fifth Circuit found none of them independently actionable. The court applied a basic principle: some things that happen to an employee in the workplace simply cannot be sued on under Title VII .

The principle is hardly revolutionary. This Court has applied it twice in hostile-work-environment cases:

> [N]ot all workplace conduct that may be described as "harassment" affects a "term, condition, or privilege"at of employment within the meaning of Title VII. *See Rogers v. EEOC*, [454 F.2d 234, 238 (5th Cir. 1971), *cert. denied*, 406 U.S. 957, 92 S. Ct. 2058

> (1972)] ("mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee" would not affect the conditions of employment to sufficiently significant degree to violate Title VII); *Henson* [*v. Dundee*, 682 F.2d 897, 904 (11th Cir. 1982)] (quoting same). For sexual harassment to be actionable, it must be sufficiently severe or pervasive "to alter the conditions of [the victim's] employment and create an abusive working environment."

Meritor Sav. Bank, 477 U.S. at 67, 106 S. Ct. at 2405.

> This standard . . . takes a middle path between making actionable any conduct that is merely offensive and requiring the conduct to cause a tangible psychological injury. As we pointed out in *Meritor*, "mere utterance of an . . . epithet which engenders offensive feelings in a employee," . . . does not sufficiently affect the conditions of employment to implicate Title VII. Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment — an environment that a reasonable person would find hostile or abusive — is beyond Title VII's purview.

Harris, 510 U.S. at 21, 114 S. Ct. at 370. In non-harassment cases like this one, the limiting principle is most often expressed by the requirement that a plaintiff must prove that a defendant took an "adverse employment action" because of a prohibited characteristic. Although this Court has never directly addressed whether such a requirement exists under Title VII, or defined

its scope outside the context of sexual harassment, it has used the phrase "adverse employment action" with no apparent reservations in other Title VII cases. *See St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 113 S. Ct. 2742 (1993); *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 109 S. Ct. 2115 (1989); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S. Ct. 1775 (1989).

The principle derives, moreover, from unambiguous statutory language. Section 704(a) of Title VII provides that:

> It shall be an unlawful employment practice for an employer to *discriminate against* any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. § 2000e-3(a) (emphasis added). To "discriminate" is, of course, to treat differently. *See* WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 362 (9th ed. 1986) ("to make a difference in treatment or favor on a basis other than individual merit"); *see also* Bryan A. Garner, A DICTIONARY OF MODERN LEGAL USAGE 282 (2d ed. 1995). The word "against" means adverse or negative. BLACK'S LAW DICTIONARY 61 (6th ed. 1990) ("adverse to"); WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 362 (9th ed. 1986) ("unfavorable to"). Thus, by proscribing "discrimination against" employees, the statute prohibits employers from treating employees differently in an "adverse" or "unfavorable" way.

The notion that not every workplace occurrence that an employee dislikes can give rise to a Title VII claim also is related

to well-settled legal principles presumably incorporated into Title VII. First, Title VII authorizes, and Mattern sought, relief through a "civil action." 42 U.S.C. § 2000e-5(f)(1). To maintain a civil action, the law requires a legally cognizable injury as distinguished from and in addition to damages: "even where a wrongful act has caused pecuniary loss, a plaintiff will be without a remedy where he has suffered no legally cognizable harm." 1 AM. JUR. 2D *Actions* § 56 (1994); *accord* 1A C.J.S. *Actions* § 32a (1985). "It is the fact, clearly established, of injury to the complainant — not to others — which justifies judicial intervention." *McCabe v. Atchison, T., & S.F. Ry.*, 235 U.S. 157, 162, 35 S. Ct. 69, 71 (1914). The requirement at issue is often expressed in tort cases. *E.g., Niehus v. Liberio*, 973 F.2d 526, 531-32 (7th Cir. 1992) ("There is no tort without an injury."); *Jones v. Reagan*, 696 F.2d 551, 554 (7th Cir. 1983). Employment discrimination laws, at least those that permit recovery of compensatory and punitive damages, are generally treated as providing a tort-like cause of action. *See Commissioner v. Schleier*, 515 U.S. 323, 334-36, 115 S. Ct. 2159, 2163-67 (1995). Accordingly, the law requires a plaintiff in an employment discrimination case to show some actual injury to prevail on a claim. *E.g., Lawrence v. National Westminster Bank N.J.*, 98 F.3d 61, 72 (3rd Cir. 1996) (employee suffered no cognizable injury under Older Workers Benefit Protection Act where his employer asked him to sign an invalid waiver but he did not); *Adams v. Bethlehem Steel Corp.*, 736 F.2d 992, 994 (4th Cir. 1984) (allegations concerning mere existence of discriminatory policy without claims of application of policy to plaintiffs did not allege a cognizable injury under Title VII).

Second, limitation of Title VII's reach to legally cognizable injuries is consistent with the maxim *de minimis non curat lex* — "the law cares not for trifles." That "venerable maxim . . . is part of the established background of legal principles against which all enactments are adopted, and which all enactments (absent contrary indication) are deemed to accept." *Wisconsin Dep't of Revenue v. William Wrigley, Jr., Co.*, 505 U.S. 214, 231, 112 S. Ct. 2447, 2457-

58 (1992). As the Seventh Circuit has aptly put it, even in civil rights cases the law places "outside the scope of legal relief the sorts of intangible injuries normally small and invariably difficult to measure that must be accepted as the price of living in society rather than made a federal case out of." *Swick v. City of Chicago*, 11 F.3d 85, 87 (7th Cir. 1993). Mattern's contention that any discrimination is actionable, no matter how slight or intangible its effects, cannot be squared with this Court's earlier rulings, the plain language of the statute, the traditional elements of an "action," or the *de minimis* doctrine.

Whether Title VII incorporates an adverse-employment-action requirement is not open to reasonable debate: it does. On the other hand, reasonable judges can differ and have differed about where to draw the line between actionable conduct and conduct that simply does not constitute "discrimination against" an employee. But that is not the kind of "conflict" this Court traditionally has exercised its discretionary jurisdiction to resolve. In fact, premature involvement by this Court, as the lower courts gradually work toward a standard through the normal process of case-by-case adjudication, could well be counterproductive.

A. The Views of the Other Circuits Courts

As Mattern points out, the Fourth Circuit applies essentially the same test for adverse employment actions as the Fifth Circuit. *Petition* at 12-13. The similarity is not surprising given that the Fifth Circuit's test was adopted from the Fourth Circuit's seminal opinion in *Page v. Bolger*, 645 F.2d 227, 233 (4th Cir.) (*en banc*) (Title VII prohibits only "ultimate employment decisions" and not "interlocutory or mediate decisions having no immediate effect upon employment conditions"), *cert. denied*, 454 U.S. 892, 102 S. Ct. 388 (1981). *See* App. 10a-11a; *Dollis v. Rubin*, 77 F.3d 777, 781-82 (5th Cir. 1995); *see also Hopkins v. Baltimore Gas and Elec. Co.*, 77 F.3d 745, 755 (4th Cir.), *cert. denied*, 117 S. Ct. 70 (1996).

The Sixth Circuit also applies a test that, like the Fifth Circuit's, looks for "ultimate employment decisions" before asking whether a particular event was discriminatorily motivated. *Cesaro v. Lakeville Community Sch. Dist.*, 953 F.2d 252, 254 (6th Cir.), *cert. denied*, 506 U.S. 867, 113 S. Ct. 195 (1992); *see also Yates v. Avco Corp.*, 819 F.2d 630, 638 (6th Cir. 1987); *accord Geisler v. Folsom*, 735 F.2d 991, 994-95 (6th Cir. 1984) (affirming district court's finding that the "predictable tension" that arose after others became aware of plaintiff's filing of EEOC charge was not adverse employment action prohibited by Title VII).

The Eighth Circuit recently cited the Fifth Circuit's decision below with approval in holding that a particular transfer and a poor employment evaluation were not adverse employment actions:

> Although "actions short of termination may constitute adverse actions within the meaning of the statute," *Smith* [*v. St. Louis Univ.*, 109 F.3d 1261, 1266 (8th Cir. 1997) (relied on by Mattern)], "not everything that makes an employee unhappy is an actionable adverse employment action." *Smart v. Ball State Univ.*, 89 F.3d 437, 441 (7th Cir. 1996); *see Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 707-08 (5th Cir. 1997). Rather, the action must have had some adverse impact on [the plaintiff] to constitute an adverse employment action. *See Mattern*, 104 F.3d at 708; *Williams v. Bristol-Myers Squibb Co.*, 85 F.3d 270, 274 (7th Cir. 1996).

Montandon v. Farmland Indus., Inc., 116 F.3d 355, 359 (8th Cir. 1997). Even more recently, the Eight Circuit applied the Fifth Circuit's test without citing *Mattern*: "While the action complained of may have had a tangential effect on her employment, it did not rise to the level of an ultimate employment decision intended to be actionable under Title VII."

Ledergerber v. Stangler, __ F.3d __, 1997 WL 545970, at *2-3 (8th Cir. Sept. 8, 1997); *see also Harlston v. McDonnell Douglas Corp.*, 37 F.3d 379, 382 (8th Cir. 1994) ("Changes in duties or working conditions that cause no materially significant disadvantage . . . are insufficient to establish the adverse conduct required to make a prima facie case."); *Bradford v. Norfolk S. Corp.*, 54 F.3d 1412, 1420 (8th Cir. 1995) (ADEA case).

Although the Seventh Circuit has not always been consistent in applying its adverse action standard, *see McDonnell v. Cisneros*, 84 F.3d 256, 258 (7th Cir. 1996) (noting "tension" in the cases), it plainly has one. Most often, the standard is described as requiring "a materially adverse change in the terms and conditions of employment." *Crady v. Liberty Nat'l Bank & Trust Co. of Ind.*, 993 F.2d 132, 136 (7th Cir. 1993); *accord Williams v. Bristol-Myers Squibb Co.*, 85 F.3d 270, 274 (7th Cir. 1996); *Flaherty v. Gas Research Inst.*, 31 F.3d 451, 456-57 (7th Cir. 1994); *see also Smart*, 89 F.3d at 441 (negative performance evaluations alone do not constitute "adverse employment actions" under Title VII; "not everything that makes an employee unhappy is an actionable adverse action"). In *Williams*, the court noted the necessity of some rule of limitation:

> Otherwise, every trivial personnel action that an irritable, chip-on-the-shoulder employee did not like would form the basis of a discrimination suit. The Equal Employment Opportunity Commission, already staggering under an avalanche of filings too heavy for it to cope with, would be crushed, and serious complaints would be lost among the trivial.

85 F.3d at 274. The Seventh Circuit's test is therefore generally consistent with the Fifth Circuit's, despite a few decisions in which application of the test has resulted in outcomes different than in this case.

Mattern's contention that the Fifth Circuit's position conflicts with the Seventh Circuit's is thus incorrect. *Collins v. State of Illinois*, 830 F.2d 692, 703 (7th Cir. 1987), for example, simply recognized that "Title VII does not limit adverse job action to strictly monetary considerations"; the Fifth Circuit's standard does not suggest otherwise. *Reeder-Baker v. Lincoln National Corp.*, 834 F.2d 1373, 1375 (7th Cir. 1987), is likewise inapposite: whether the acts complained of there were sufficient to support a claim was not even raised. Finally, the cases cited in footnote five of Mattern's petition all involve claims of First Amendment violations and some involve specific allegations of "harassment." Mattern makes no attempt to explain why the test should be the same under the First Amendment and Title VII, and, as explained above, she has not presented a cognizable claim for "harassment."

The Second Circuit, contrary to Mattern's contention, has not "recognized a retaliation claim where an employer, allegedly for retaliatory reasons, had failed to ask a complainant if she wanted to work on a particular overtime assignment." *Petition* at 12 (citing *Aldrich v. Randolph Cent. Sch. Dist.*, 963 F.2d 520, 529 (2nd Cir.), *cert. denied*, 506 U.S. 965, 113 S. Ct. 440 (1992)). The Second Circuit affirmed summary judgment on the merits for the employer in that case; the issue of adverse employment action was either not raised or not ruled on. *Id.* In fact, the Second Circuit applies a test akin to the Seventh Circuit's test, but with more consistency. In the Second Circuit, to prove an adverse employment action, a plaintiff must show "a materially adverse change in the terms and conditions of employment." *Torres v. Pisano*, 116 F.3d 625, 639-40 (2d Cir. 1997) (employer's request that the plaintiff drop her EEOC charge, which "frightened" and "intimidated" her, was not an adverse employment action).[2]

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2. *Accord Wanamaker v. Columbian Rope Co.*, 108 F.3d 462, 465-67 (2d Cir. 1997) (ADEA protects employees from actions "injurious" to current employment or the ability to secure future employment; barring a discharged employee from using an office and phone to conduct a job hunt was only a "minor,

(Cont'd)

The Third Circuit, whose position on the issue Mattern does not address, recently adopted a standard for defining adverse employment action:

> Retaliatory conduct other than discharge or refusal to rehire is thus proscribed by Title VII only if it alters the employee's "compensation, terms, conditions, or privileges of employment," deprives him or her of "employment opportunities," or "adversely affect[s] his [or her] status as an employee." It follows that "not everything that makes an employee unhappy" qualifies as retaliation, for "[o]therwise, minor and even trivial employment actions that an 'irritable, chip-on-the shoulder employee did not like would form the basis of a discrimination suit.' " [quoting *Smart*, 89 F.3d at 441, and *Williams*, 85 F.3d at 274].
>
> Courts have operationalized the principle that retaliatory conduct must be serious and tangible enough to alter an employee's terms, conditions, or privileges of employment into the doctrinal requirement that the alleged retaliation constitute "adverse employment action."

Robinson v. City of Pittsburgh, __ F.3d __, 1997 WL 386102, at *11 (3d Cir. July 14, 1997); *see also Nelson v. Upsala College*,

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(Cont'd)
ministerial stumbling block" and thus was not an adverse employment action under the ADEA); *Van Zant v. KLM Royal Dutch Airlines*, 80 F.3d 708, 713 n.3 (2d Cir. 1996) (supervisor's "occasional nastiness, which other employees also were subject to," was not an adverse employment action sufficient to support a Title VII retaliation claim).

51 F.3d 383, 389 (3rd Cir. 1995). The court applied its standard to hold that "unsubstantiated oral reprimands" and "unnecessary derogatory comments" were not adverse employment actions under Title VII. *Robinson*, 1997 WL 386102, at *3.

The First Circuit addressed the adverse-employment-action issue in *Welsh v. Derwinski*, 14 F.3d 85 (1st Cir. 1994), a case relied on by Mattern. The court considered whether reducing the plaintiff's duties, which the plaintiff alleged eliminated the potential for him to obtain a status upgrade, was sufficiently adverse. In doing so it disagreed with the defendant's argument that "only discharge, demotion, or failure to promote can constitute an adverse employment action" under the Age Discrimination in Employment Act ("ADEA"). *Id.* at 86.[3] But the court also conceded that "not every unpleasant matter short of those [actions] creates a cause of action." *Id.* And the court went on to hold that the district court's "finding that plaintiff failed to make a prima facie showing of adverse employment action must stand" because reducing the plaintiff's duties did not prevent him from obtaining a status upgrade. *Id.* at 87. That approach is consistent with the Fifth Circuit's. *See* App. 11a (rejecting certain events as adverse employment actions "because of their lack of consequence").

The Eleventh Circuit, as Mattern correctly noted, has not defined "adverse employment action." *Wu v. Thomas*, 996 F.2d 271, 273-74 (11th Cir. 1993), *cert. denied*, 511 U.S. 1033, 114 S. Ct. 1543 (1994). But *Wu* did hold that it was not "clearly established" for qualified immunity purposes that retaliatory harassment, as opposed to sexual or racial harassment, was actionable under Title

3. Given the similarity between the anti-retaliation provisions in Title VII, 42 U.S.C. § 2000e-3(a), and the ADEA, 29 U.S.C. § 623(d), Eastman agrees with the argument implicit in Mattern's petition that the two probably should be interpreted similarly and thus that cases under one statute may be relevant in interpreting the other.

VII. *Id.* at 274-75. That holding is not relevant here because Mattern did not assert a retaliatory harassment claim. And the Eleventh Circuit's decisions before *Wu* show that it does place limits on actions for alleged retaliation. In *Bailey v. USX Corp.*, 850 F.2d 1506, 1508-09 (11th Cir. 1988), for example, the court affirmed the district court's judgment against a plaintiff who claimed that a negative employment reference was retaliatory. The court emphasized that because the plaintiff would not have been hired for the position for which the reference was provided anyway, he suffered no injury; and his removal from a civil service list of qualified candidates was temporary, so any harm was minimal. *Id.*; *cf. Jordan v. Wilson*, 851 F.2d 1290, 1292-93 (11th Cir. 1988); *see also Reynolds v. CSX Transp., Inc.*, 115 F.3d 860, 868 (11th Cir. 1997) (temporary replacement of the plaintiff that led to her being out of work for almost a week and being unpaid for the absence until almost six months later, was an adverse employment action sufficient to support Title VII retaliation claim).

The Tenth Circuit apparently has not adopted a verbal formula defining "adverse employment action." But it has held that various actions were not sufficiently adverse to support a claim and, in the process, suggested that a plaintiff must show some harm to employment status or opportunities. *Berry v. Stevinson Chevrolet*, 74 F.3d 980, 986 (10th Cir. 1996) (retaliatory prosecution can have an adverse impact on future employment opportunities and therefore can be an adverse employment action under Title VII); *Cole v. Ruidoso Mun. Schs.*, 43 F.3d 1373, 1381-82 (10th Cir. 1994) (employer's change in its explanation of the basis for the plaintiff's removal after she filed an EEOC charge did not cause the harm the plaintiff complained of and thus was not an adverse employment action); *Meredith v. Beech Aircraft Corp.*, 18 F.3d 890, 896 (10th Cir. 1994) (performance evaluation that was lower than previous rating was not an adverse employment action where there was no indication of injury or detriment because of the evaluation); *see also Mosley v. Pena*, 100 F.3d 1515, 1519 (10th Cir. 1996)

(employer's failure to settle the plaintiff's EEOC complaint was not an adverse employment action).

The Ninth Circuit's view is best described as inconsistent. In *Strother v. Southern California Permanente Medical Group*, 79 F.3d 859, 869 (9th Cir. 1996), the court held that "[n]ot every employment decision amounts to an adverse employment action" and noted that "mere ostracism in the workplace is not enough to show an adverse employment action." While the case was brought under California's fair employment practices statute, that statute is interpreted consistently with federal anti-discrimination legislation, and the Ninth Circuit cited Title VII cases to support its holding. *Id.* at 866, 869 n.12; *see also Nidds v. Schindler Elevator Corp.*, 113 F.3d 912, 919 (9th Cir. 1997) (transfer of employee with no effect on compensation was not an adverse employment action despite employee's characterization of transfer as demotion), *petition for cert. filed*, No. 97-364 (July 29, 1997); *Steiner v. Showboat Operating Co.*, 25 F.3d 1459, 1465 n.6 (9th Cir.) (questioning whether transfer from swing shift to day shift was adverse employment action where employee "was not demoted, or put in a worse job, or given any additional responsibilities"), *cert. denied*, 513 U.S. 1081, 115 S. Ct. 733 (1994).

But in *Hashimoto v. Dalton*, 118 F.3d 671, 675-76 (9th Cir. 1997), the court seemed to hold that completely inconsequential retaliation is actionable under Title VII: it allowed a negative employment reference to be sued on even though the plaintiff would not have gotten the desired job for other reasons. The court expressly rejected what it called the employer's "no harm, no foul" approach, concluding that the adverse job reference violated Title VII simply because it was a "personnel action" motivated by retaliatory animus. *Id.* at 674-76. *Hashimoto*'s recognition of a unique Title VII civil action that does not require a legally cognizable injury is wrong, but more importantly it is inconsistent even with other decisions from the same court. Until the court speaks *en banc* to reconcile its conflict, the Ninth Circuit must be considered as undecided on

whether a Title VII action requires proof of some actual negative effect on an employment relationship.

The District of Columbia Circuit sets one of the lowest thresholds for actionable conduct under Title VII and related discrimination statutes, using the formulation that an employer must engage in conduct "having an adverse impact on the plaintiff." *Passer v. American Chem. Soc'y*, 935 F.2d 322, 331 (D.C. Cir. 1991). In *Passer*, the employer's cancellation of a program to honor the plaintiff was held sufficiently adverse under the ADEA on the notion that the public humiliation involved "made it more difficult for him to procure future employment." *Id.* at 331. Yet in *Berger v. Iron Workers Reinforced Rodmen Local 201*, 843 F.2d 1395, 1423-24 (D.C. Cir. 1988), *cert. denied*, 490 U.S. 1105, 109 S. Ct. 3155 (1989), the same court held that veiled threats by a union official that he would "make it hard on those who filed this suit" and would withhold the plaintiff's application for a training program until he agreed to drop his charge of discrimination were not adverse actions under Title VII because the threats were not carried out and thus "had no effect." *Id.* at 1424; *see also Gary v. Long*, 59 F.3d 1391, 1396 (D.C. Cir.) (threats of adverse consequences that were never carried out constituted mere "saber rattling" insufficient to demonstrate *quid pro quo* harassment), *cert. denied*, 116 S. Ct. 569 (1995); *Henry v. Guest Servs., Inc.*, 902 F. Supp. 245, 251-52 (D.D.C. 1995) (plaintiff's receipt of a cartoon making light of his disability was not an adverse employment action because it was not severe and pervasive enough to alter the terms of his employment), *aff'd*, 98 F.3d 646 (table), 1996 WL 560362 (D.C. Cir. 1996).

B. The Fifth Circuit's View

The Fifth Circuit's approach to the adverse-employment-action issue is sound. Lost in Mattern's hyperbolic criticism of the court's use of the term "ultimate employment action" is any real sense of what the phrase actually means. It first requires some conduct by

the employer that has an actual negative impact on the plaintiff as an employee. Thus, if an employee who receives three warnings of deficient performance is discharged or denied a pay increase, the discharge or missed pay increase, either of which of course has an actual negative effect on the employment relationship, is actionable. The performance warnings themselves, however, caused no harm, although they might be evidence for one side or the other in an action based on the discharge or denied pay increase. But if an employee receives two performance warnings, improves, is not discharged, and receives the raises, there has been no actual negative impact on the employment relationship — no "discrimination against" the employee. The Fifth Circuit's focus on the "ultimate" employment decision simply looks for an actual impact on the plaintiff's employment, excluding those actions that could in the future but do not currently or inevitably impact it.

What Mattern seems to take the most issue with is the Fifth Circuit's implicit requirement that whether an action is adverse must be judged objectively as well as subjectively. Employment discrimination plaintiffs obviously prefer a standard under which the "adverse-ness" or "against-ness" of an employer's actions is decided conclusively by the employee's own view of it: "I do not like it; therefore it is adverse." But did Congress suggest or even permit such a standard?

The law generally disfavors basing legal rights on purely subjective standards, as illustrated by many of this Court's decisions. *E.g. Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 60, 113 S. Ct. 1920, 1928 (1993) (rejecting subjective standard for defining "sham" exception to *Noerr* antitrust immunity); *Harlow v. Fitzgerald*, 457 U.S. 800, 815-19, 102 S. Ct. 2727, 2736-39 (1982) (rejecting subjective aspect of qualified immunity defense and opting for purely objective test); *Smith v. Maryland*, 442 U.S. 735, 740, 99 S. Ct. 2577, 2580 (1979) (objective and subjective expectation of privacy is required to complain of privacy deprivation under Fourth Amendment).

Courts, including this one, insist on objective showings under Title VII and other discrimination statutes as well. In a hostile-work-environment claim, for example, the Court requires plaintiffs to demonstrate "an objectively hostile or abusive work environment — an environment that a reasonable person would find hostile or abusive." *Harris*, 510 U.S. at 21, 114 S. Ct. at 370. The Court also compels employers to meet objectively verifiable standards before asserting Title VII's bona-fide-occupational-qualification defense. *International Union, United Aerospace and Agricultural Implement Workers of Am. v. Johnson Controls, Inc.*, 499 U.S. 187, 201, 111 S. Ct. 1196, 1204 (1991). And all of the circuit courts require plaintiffs to meet an objective standard for proving a constructive discharge.[4]

A purely subjective test for adverse action under the employment discrimination statutes would have the same defects as similar standards in other settings. What constitutes differential negative treatment — "discrimination against" — for one person may be favorable treatment to another. Cases already on the books illustrate the point. *Compare Dollis*, 77 F.3d at 782 (plaintiff alleged that *denying* her a desk audit was an adverse employment action) *with Harris*, __ F.3d __, 1997 WL 384618, *2, *5 (8th Cir. July 14, 1997) (to be reported at 119 F.3d 1313) (plaintiff alleged that *receiving* a desk audit was an adverse employment action) *and Deavenport v. MCI Tel. Corp.*, 1997 WL 467160, *8 (D. Col. Aug. 13, 1997)

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4. *E.g.*, *Gartman v. Gencorp Inc.*, 120 F.3d 127, 130 (8th Cir. 1997); *Thomas v. Denny's, Inc.*, 111 F.3d 1506, 1514 (10th Cir. 1997); *Serrano-Cruz v. DFI Puerto Rico, Inc.*, 109 F.3d 23, 26 (1st Cir. 1997); *Ward v. Bechtel Corp.*, 102 F.3d 199, 202 (5th Cir. 1997); *Burns v. AAF-McQuay, Inc.*, 96 F.3d 728, 733 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 1247 (1997); *Kilgore v. Thompson & Brock Mgmt., Inc.*, 93 F.3d 752, 754 (11th Cir. 1996); *Chertkova v. Connecticut Gen. Life Ins. Co.*, 92 F.3d 81, 89 (11th Cir. 1996); *Rabinovitz v. Pena*, 89 F.3d 482, 489 (7th Cir. 1996); *Aman v. Cort Furniture Rental Corp.*, 85 F.3d 1074, 1084 (3rd Cir. 1996); *Schnidrig v. Columbia Mach., Inc.*, 80 F.3d 1406, 1411 (9th Cir.), *cert. denied*, 117 S. Ct. 295 (1996); *Simpson v. Federal Mine Safety and Health Review Comm'n*, 842 F.2d 453, 462-62 & n.8 (D.C. Cir. 1988); *Yates v. Avco Corp.*, 819 F.2d 630, 636-37 (6th Cir. 1987).

(plaintiff complained of being "forced" to travel extensively) *with Lawson v. McPherson*, 679 F. Supp. 28, 32 (D.D.C. 1986) (plaintiff complained of being denied travel opportunities) *and Martin v. Frank*, 788 F. Supp. 821, 824 (D. Del. 1992) (plaintiff alleged discrimination in being forced to work two hours of overtime) *with Patel v. Allstate Ins. Co.*, 105 F.3d 365, 373 (7th Cir. 1997) (plaintiff complained of being denied permission to work overtime) *and Aldrich*, 963 F.2d at 528 (same). Mattern complained that a "final warning" was an adverse action. Other employees could complain, and no doubt have, that their employer discriminated by failing to warn them of deficient performance. Ease of assertion, difficulty of disproof, failure to give notice of liability-creating conduct — the law's traditional reasons for rejecting subjective standards of liability — apply fully to civil actions authorized by Congress in the employment discrimination statutes. Mattern offers no reasons why courts should hold otherwise.

Properly understood, the Fifth Circuit's test for adverse employment action requires only a current (or inevitable) objectively negative impact on the employment relationship. Most other circuits agree, even if they phrase the test differently, because they have found not actionable conduct that does not fit within it. Only one panel in the Ninth Circuit has arguably staked out a different position, but given the evident inconsistency with other Ninth Circuit opinions, that decision hardly gives rise to a clear conflict that warrants this Court's intervention.

C. Policy Concerns Support the Fifth Circuit's View

Practical policy concerns, of which Congress should not be assumed ignorant, also support the Fifth Circuit's standard. The Administrative Office of U.S. Courts reported a 25 percent increase in filings of civil rights employment cases in district courts and a 17 percent increase in appeals of such cases for fiscal year 1996. Administrative Office of U.S. Courts, *Federal Courts Caseload Continues Upward Spiral* (Press_Release March 12, 1997) (available at http://www.uscourts.gov/Press Releases/index.htm). Some judges have even called for the creation of special

employment courts because "the federal courts are flooded with employment cases." *Tschappat v. Reich*, 957 F. Supp. 297, 299 (D.D.C. 1997) (Sporkin, J.).

The effect of the Civil Rights Act of 1991 cannot be overlooked. It allows plaintiffs to recover up to $300,000 in compensatory and punitive damages, depending on the size of the employer, for violations of Title VII and the Americans with Disabilities Act of 1990. Even more important, money recoveries are no longer limited to the equitable restoration of lost wages and benefits but may include damages for less tangible harms such as "emotional pain, suffering, inconvenience, mental anguish . . . [and] loss of enjoyment of life." 42 U.S.C. § 1981a(b)(3). The former self-limiting feature of Title VII — availability of monetary relief only for defined, tangible losses — is gone, an absence that almost certainly accounts for the recent surge of cases discussing the adverse-employment-action requirement. There is now a hugely increased incentive for employees to sue when anything, no matter how minor or inconsequential, occurs in the workplace that might be attributed to discrimination. Congress of course could have chosen to allow actions under Title VII "involving trivial slights, real and imagined,"[5] but nothing in the language of the statute or its remedial scheme suggests that Congress did so.

III.

THE FIFTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT.

Mattern argues that the Fifth Circuit's decision conflicts with three of this Court's decisions, *Robinson v. Shell Oil Co.*, 117 S. Ct. 843 (1997); *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 114 S. Ct. 367 (1993); and *Meritor Savings Bank v. Vinson*, 477 U.S.

5. *Talanda v. KFC Natl. Mgmt. Co.*, 6 A.D. Cas. (BNA) 1321, 1997 WL 160695 (N.D. Ill. April 2, 1997).

57, 106 S. Ct. 2399 (1986), and that its reasoning is inconsistent with the Court's decision in *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 110 S. Ct. 2729 (1990).

In *Robinson*, the Court held only that "former employees are included within § 704(a)'s coverage." 117 S. Ct. at 849. It did not, as Mattern puts it, "uph[o]ld a cause of action under section 704(a) based on a retaliatory job reference." The validity of that cause of action, beyond the question of whether it may be asserted by a former employee, was not before the Court. Moreover, there was no reason for it to be. As Mattern's counsel well knows, having appeared on the brief in *Robinson*, the negative reference there *did* cause an adverse employment action: the prospective employer to whom the reference was given did not hire the plaintiff. Brief for Petitioner, *Robinson v. Shell Oil Co.*, 1996 WL 341308, * 3 (U.S. 1996) (No. 95-1376). Because the Court expressed no opinion as to the validity of the cause of action at all, it certainly did not hold that the plaintiff would have stated a Title VII claim even if the prospective employer had hired him.[6]

The Fifth Circuit's decision is likewise not inconsistent with this Court's holding that former employees are covered by section 704(a). Indeed, the Fifth Circuit has held that the analogous retaliation provision in the ADEA applies to former employees. *EEOC v. Cosmair, Inc.*, 821 F.2d 1085, 1088 (5th Cir. 1987). The fact that the hiring decision in *Robinson* was made by a different

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6. *Compare Smith v. St. Louis Univ.*, 109 F.3d 1261, 1266 (8th Cir. 1997) (negative references causing potential employers to decline to hire plaintiff constituted actionable retaliation) *and Ruedlinger v. Jarrett*, 106 F.3d 212, 214 (7th Cir. 1997) (providing information to subsequent employer that caused it to fire plaintiff was adverse employment action) *with Bailey v. USX Corp.*, 850 F.2d 1506, 1508-09 (11th Cir. 1988) (because the plaintiff would not have been hired for the position he sought, he was not injured by his employer's provision of a negative reference) *and Hashimoto v. Dalton*, 118 F.3d 671, 675-76 (9th Cir. 1997) (a negative employment reference was actionable retaliation even though the plaintiff would not have gotten the job in any event).

employer than the one the plaintiff sued does not vitiate the adverse-employment-action requirement. Instead, it only reflects that in cases involving former employees, the terminology used in describing the limits of § 704(a) may have to be adjusted to account for the different circumstances involved in such cases. *Cf. McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S. Ct. 1817, 1824 n.13 (1973) (noting that the standards for establishing a *prima facie* case of discrimination will vary in different factual situations). In sum, *Robinson* did not address the relevant issue and the Fifth Circuit's decision does not conflict with it.

Mattern's argument that the Fifth Circuit's decision contradicts *Harris* and *Meritor Savings Bank* is nonsense. As explained above, both opinions establish that certain conduct, even if motivated by discriminatory animus, is not actionable; they are fully consistent with the underlying principle applied by the Fifth Circuit. Moreover, as also explained above, Mattern made no hostile-work-environment claim based on retaliation. Not being free to ignore the case actually before it, the Fifth Circuit properly did not consider the alleged events Mattern complained of in their totality under the standards established in *Harris* and *Meritor Savings Bank*. Likewise, the Fifth Circuit did not purport to define "discrimination" so as to exclude "[s]ystematic harassment," as Mattern contends. Mattern's focus on harassment means that she either is ignoring that she brought no such claim or that she would have the Fifth Circuit permit her to assert such a claim but avoid meeting the standards for it established by this Court. If she intends the latter, it is her position, not the Fifth Circuit's, that conflicts with *Harris* and *Meritor Savings Bank*.

Mattern's argument that the Fifth Circuit's decision contravenes *Rutan* highlights her mistaken view that there should be no limits whatsoever to retaliation liability despite authority from this Court and traditional legal doctrines to the contrary. In *Rutan* the Court held that employment decisions concerning "promotions, transfers,

and recalls after layoffs based on political affiliation or support are an impermissible infringement on the First Amendment rights of public employees." 497 U.S. at 75, 110 S. Ct. at 2737. At the outset, *Rutan* sheds no light on the issue here because it was decided under the First Amendment not Title VII, and Mattern has not attempted to show that the same standards do or should apply under both. Although there are some inherent similarities between patronage discrimination and protected-activity discrimination, there are also different considerations involved in each, most prominently that one involves constitutional concerns and the limits of governmental power.

In any event, the Fifth Circuit's decision does not conflict with *Rutan* even if the same standards apply. The Court did not hold, as Mattern contends, that the First Amendment prohibits "*any* retaliation" without limitation. The Court did reject the Seventh Circuit's standard under the First Amendment (which is different than that circuit's standard under Title VII) holding actionable "only those employment decisions that are the 'substantial equivalent of a dismissal.' " *Id.* But it did not imply that there were no limits. In fact, it expressly found that employees subjected to certain actions short of discharge still may be "adversely affected" and explained some of the harms those employees could experience. 497 U.S. at 73, 110 S. Ct. at 2736.

The Fifth Circuit's test, as articulated in *Mattern*, does not require, as the Seventh Circuit had in *Rutan*, the "substantial equivalent of a dismissal" before a violation occurs. The court expressly recognized various kinds of decisions as actionable, including ones related to leaves of absence, promotions, and compensation, all of which are short of discharge. More specifically, and contrary to Mattern's apparent reading of the opinion below, the Fifth Circuit did not hold that promotions, transfers, and recalls after layoffs are not actionable under Title VII. The first and last of those actions plainly fall within the Fifth Circuit's non-exclusive

definition of "adverse employment action." And the court said nothing about transfers. But transfers are akin to hiring and promoting, or even demoting (which the Fifth Circuit also did not mention), all of which fit within the court's definition of adverse employment action: they all are the kind of "ultimate employment decisions," as compared to "interlocutory or mediate" decisions, that do or can have an objectively negative impact on the employment relationship.[7] In short, *Rutan* is inapplicable here, and the Fifth Circuit's decision does not in any case contradict it.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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7. As other circuits have recognized, a particular transfer may or may not be an adverse employment action depending on the circumstances and the real, objectively measurable impact on the employee. *E.g.*, *Montandon v. Farmland Indus., Inc.*, 116 F.3d 355, 359 (8th Cir. 1997); *Davis v. City of Sioux City*, 115 F.3d 1365, 1369 (8th Cir. 1997); *Williams v. Bristol-Myers Squibb Co.*, 85 F.3d 270, 274 (7th Cir. 1996); *Flaherty v. Gas Research Inst.*, 31 F.3d 451, 456-57 (7th Cir. 1994).

No. 97-126

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

JEAN G. MATTERN,

Petitioner,

v.

EASTMAN KODAK COMPANY, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONERS' REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

(1) The parties are not in disagreement regarding the substance of the Fifth Circuit's interpretation of the scope of § 704(a). We set forth in the petition (at 7-8) twelve distinct retaliatory practices expressly declared lawful by the court of appeals. Respondents do not deny that under the decision below all of these practices may now lawfully be used in the Fifth Circuit to punish employees who complain to or cooperate with the EEOC.

The application of the Fifth Circuit rule to the instant case is also not in dispute. Respondents admit (Brief in Opposition at 6) that the jury charge defined an "adverse employment action" prohibited by § 704(a) to include, *inter alia*, "acts of sabotage . . . by employees against other employees." Contrary to respondents' assertion (*id.*, p. 5), therefore, the jury was not limited to considering "separately each alleged retaliatory action."[1] Instead, as respondents acknowledge (*id.*, p. 4), based upon all the proof the "jury found 'that Eastman intentionally or willfully retaliated against Jean Mattern for filing a charge of discrimination and/or for filing this lawsuit'" and awarded Mattern $50,000 in actual damages. Like respondents, the court of appeals did not question that factual finding, and neither respondents nor the court below suggested that the damage award was in any respect excessive.

Thus, this case presents an entirely appropriate vehicle for addressing the issue raised in the petition. That respondents acted with an unlawful retaliatory motive, and that their actions caused substantial injury, are no longer in dispute. The specific retaliatory practices on which the jury

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[1]Whether the retaliatory practices at issue in this case were assessed separately, or in combination, is in fact irrelevant. Under the Fifth Circuit decision that distinction is unimportant; since on its view none of the practices at issue was illegal, a combination of entirely lawful retaliatory actions would be no less permissible.

verdict was based provide a specific and concrete application of the Fifth Circuit's "ultimate employment action" doctrine.

(2) Respondents do not contend that any other circuit has ever held, or would hold, that the dozen retaliatory practices sanctioned by the Fifth Circuit are permissible under Title VII. Nor do respondents argue that any circuit has ever held that practices causing $50,000 in damages are too minor to be actionable under Title VII. In its actual operation, then, as indicated by the result below, the Fifth Circuit rule differs dramatically from actual practice in the other circuits.

Respondents argue solely that other circuits hold that any alleged discriminatory act is only actionable if that act is adverse to the plaintiff, *i.e.*, that the act in question must actually cause some injury. *See* Brief in Opposition, pp. 11 ("the law requires a plaintiff in an employment discrimination case to show some actual injury"), 14 (action complained of must cause a "materially significant disadvantage"), 15 ("materially adverse change in the terms and conditions of employment"), 24 (Congress did not authorize actions for "trivial slights, real and imagined"). The cases relied on by respondents require proof of actual injury. *See, e.g.*, *Adams v. Bethlehem Steel Corp.*, 736 F.2d 992, 994 (4th Cir. 1984)("the existence of a wrong without some identifiable injury does not provide a basis for redress").[2]

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[2] *Accord Harlston v. McDonnel Douglas Corp.*, 37 F.3d 379 (8th Cir. 1994) ("[c]hanges in duties or working conditions that cause no materially significant disadvantage" are not actionable); *Flaherty v. Gas Research Inst.*, 31 F.3d 451, 456 (7th Cir. 1994) (no claim can be based on employment actions that involve "no materially significant disadvantage"); *Lawrence v. National Westminster Bank N.J.*, 98 F.3d 61, 72 (3d Cir. 1996) (claim dismissed because "the district court found [plaintiff] had suffered no injury").

But the common rule that a civil rights plaintiff must prove some actual, non-trivial injury is dramatically different from the holding in this case—that an entirely real, $50,000 injury is not actionable if brought about through one of the "approved" methods of retaliation. The Fifth Circuit did not hold that a $50,000 injury is trivial or *de minimis*; such an injury would, on its view, have been fully compensable if caused, for example, by a retaliatory *dismissal*. The court of appeals overturned the jury verdict in this case, not because of any dispute about the magnitude of the harm, but because it insisted that the particular retaliatory methods utilized to inflict that harm simply were not illegal under Title VII.

(3) The Fifth Circuit itself emphasized that the rule it was adopting for retaliation cases was deliberately and dramatically different from the requirement in a garden-variety race or gender discrimination case that a plaintiff prove actual injury. The court below insisted that the scope of the prohibition against mistreatment of an employee on the basis of race or sex—encompassing *any* practice with an adverse effect—"reaches much further than" the Title VII anti-retaliation provision. (Appendix to the Petition, p. 14a.) The Title VII prohibition against adverse action taken on the basis of race or gender, the Fifth Circuit held, forbids any number of "vague harms" that are entirely permissible when engaged in to retaliate against an employee for filing a charge of race or sex discrimination. (*Id.*)

That the decision below marks a sharp departure from prior precedent is well recognized. One recent opinion observed, for example:

> the Tenth Circuit . . . has not adopted the *Mattern* standard. . . . In fact, the Tenth Circuit . . . has repeatedly permitted claims for retaliation based upon less than an "ultimate employment decision" as defined in *Mattern*. . . . Were some discriminatory acts that had a real and negative effect on a person who brings a charge of discrimination under § 2000e-

> 2(a) permitted, it would have a chilling effect upon employees' willingness to make charges or support others' charges under that section.

Deavenport v. MCI Telecommunications Corp., 1997 WL 46160, *4, *7 (D. Colo. Aug. 13, 1997). Even within the Fifth Circuit it is candidly recognized that *Mattern* has brought about a "contraction" of the protections of Title VII. *Battee v. Eckerd Drugs, Inc.*, 1997 WL 340941, *8 (N.D. Tex. June 12, 1997).

Respondents concede that "judges . . . have differed about where to draw the line between actionable conduct and conduct that simply does not constitute 'discrimination against' an employee." (Brief in Opposition 12; *see id.* at 14 (Seventh Circuit decisions "inconsistent"), 19 (Ninth Circuit decisions "inconsistent"), 20 (District of Columbia Circuit "sets one of the lowest thresholds").) The conflict is acute and must be resolved by this Court.

(4) It simply is not the case, as respondents suggest, that the jury instructions in this case anticipated or incorporated the aberrational standard adopted by the Fifth Circuit. None of the twelve now-permissible retaliatory practices approved by the Fifth Circuit are described by the jury instructions as lawful. To the contrary, the jury instruction specifically states, for example, that a retaliatory "reprimand" would be actionable (Appendix to the Petition, p. 10a), while the court of appeals expressly held that such a reprimand was not actionable. (*Id.*, p. 12a.) If the district judge had understood his jury instructions to declare lawful every retaliatory act with which respondents were charged, he would assuredly have granted respondents' motion for a judgment as a matter of law. Similarly, if the jury had understood the instructions to mean that all the proffered evidence was legally insufficient, it would not likely have returned a substantial verdict in favor of plaintiff.

Equally unavailing is respondents' argument that the jury's verdict regarding retaliation is inconsistent with its

verdict regarding sexual harassment. If the jury verdicts were indeed inconsistent, the proper remedy would have been to order a new trial on both issues. But the Fifth Circuit did not order such a new trial.

Respondents misapprehend the scope of the Question Presented when they suggest that petitioner has abandoned her objection that company officials permitted fellow workers to sabotage petitioner's work. The Question Presented is specifically framed to encompass retaliatory acts taken by fellow employees "with the knowledge of company supervisors." (Petition for a Writ of Certiorari, i.)

At trial, to be sure, a wide array of factual disputes existed between the parties, and were presented to the jury. With regard to petitioner's retaliation claims, however, the jury resolved those issues in petitioner's favor. The issue squarely presented is, therefore, whether the court below was justified in setting aside the jury's verdict.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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